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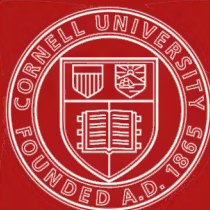
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REPORTS
OF
CASES
CIVIL AND CRIMINAL
IN THE
UNITED STATES CIRCUIT COURT
OF,
THE DISTRICT OF COLUMBIA,
FROM 1801 TO 1841,

IN SIX VOLUMES.

BY WILLIAM CRANCH,

CHIEF JUDGE OF THE COURT.

VOLUME I.

1801 TO 1810.

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J U D G E S

O F T H E

U N I T E D S T A T E S C I R C U I T C O U R T

DURING THE TIME OF THESE REPORTS.

HON. WILLIAM KILTY,
(Resigned January, 1806.)
HON. WILLIAM CRANCH,
(Appointed in 1806.)

} CHIEF JUDGES.

HON. JAMES MARSHALL,
(Resigned in 1803.)
HON. WILLIAM CRANCH,
(Appointed Chief Judge, 1806.)
HON. NICHOLAS FITZHUGH,
(Appointed in 1803.)
HON. ALLEN BOWIE DUCKETT,
(Appointed in 1806 — died, Aug. 1809.)
HON. BUCKNER THRUSTON,
(Appointed in 1809.)

} ASSISTANT
JUDGES.

DISTRICT ATTORNEYS.

JOHN THOMPSON MASON, Esq.
————— JONES, Esq.
(Appointed, November, 1804.)

MARSHAL.

DANIEL CARROLL BRENT, Esq.

P R E F A C E .

By the Act of Congress of the 13th of February 1801, the Congress of the United States passed an act entitled "An act to provide for the more convenient organization of the Courts of the United States."

By that act the United States were divided into twenty-two districts, and these subdivided into six circuits, in each of which, except the sixth, there were to be "three judges of the United States, to be called Circuit Judges, one of whom was to be commissioned as Chief Judge;" and they were to hold Circuit Courts in their respective Circuits.

Afterward in the same session, Congress passed the act of the 27th of February 1801 entitled "An Act concerning the District of Columbia," and by the third section thereof, erected, upon the same model, a Circuit Court for the District of Columbia, "to consist of one Chief Judge and two Assistant Judges;" and conferred upon "the said Court and the Judges thereof" "all the powers by law vested in the *Circuit Courts and the Judges of the Circuit Courts of the United States*;" evidently referring to the act of the 13th of February 1801, which they had previously passed at the same session; for, before that act, there had been no Judges of the Circuit Courts of the United States, *eo nomine* — the Circuit Courts being then held by one Justice of the Supreme Court of the United States and the Judge of the District Court of the District in which the Circuit Court was, for the time being, sitting.

Among the powers thus conferred upon the Circuit Court of the District of Columbia, were the power to hold special sessions for the trial of criminal causes, — the power to appoint a clerk

in each of the two counties in the said district; namely, the counties of Washington and Alexandria.

By the fifth section of the act of February 27th 1801, it is enacted that the said Court "shall have cognizance of all crimes and offences committed within said District; and of all cases in law and equity between parties both or either of which shall be resident, or shall be found within said District; and also of all actions and suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water; and all penalties and forfeitures made, arising or accruing under the laws of the United States."

By the first section of the act, it is enacted, "That the laws of the State of Virginia as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said State to the United States, and by them accepted for the permanent seat of government; and that the laws of the State of Maryland, as they now exist, shall be and continue in force in that part of the said District which was ceded by that State to the United States and by them accepted as aforesaid."

And by the second section it is enacted, "That the said District of Columbia shall be formed into two counties; one county shall contain all that part of the said District which lies on the east side of the River Potomac, together with the islands therein, and shall be called the County of Washington; the other county shall contain all that part of said District which lies on the west side of said river, and shall be called the County of Alexandria; and the said river in its whole course through said District shall be taken and deemed, to all intents and purposes, to be within both of said counties."

By the seventh section of the act a Marshal, and, by the ninth section an Attorney of the United States for the District are to be appointed, and by the eleventh section as many Justices of the Peace as the President of the United States shall from time to time, think expedient; to hold their office for five years, and, in whatever relates to the conservation of the peace, to have all the powers vested in, and to perform all the duties required of,

Justices of the Peace as individual magistrates by the laws of Virginia and Maryland respectively continued in force in the District by the first section of the act; and to have cognizance of personal demands, not exceeding the value of twenty dollars, extended to fifty dollars by the act of March 1, 1823.

By the eighth section of the act of 27th of February 1801 an appeal or writ of error to the Supreme Court of the United States is given, from any final judgment, order or decree of the Circuit Court of the District of Columbia where the matter in dispute exceeds the value of one hundred dollars, afterward extended by the act of April 2, 1816, ch. 39, to one thousand dollars. But where the value is more than one hundred dollars, and less than one thousand dollars, an appeal or writ of error may be allowed by a Judge of the Supreme Court, "if he shall be of opinion that the errors involve questions of law of such extensive interest and operation as to render the final decision of them by the Supreme Court desirable." By the twelfth section of the act of 27th of February 1801, a Register of Wills and a Judge of the Orphans' Court in each county are to be appointed, to have the like powers and to perform the like duties, as were then exercised and performed by the like officers *in Maryland*; and an appeal from the Orphans' Court to the Circuit Court is given.

By the act of the 29th of April, 1802, a District Court of the United States for the District of Columbia, having the same powers and jurisdiction which were by law vested in the other District Courts of the United States is directed to be holden twice a year, by the Chief Judge of the District of Columbia, from whose judgment or decree a writ of error or appeal lies to the Circuit Court of the District, and from that to the Supreme Court of the United States.

The act of the 13th of February, 1801, was repealed at the following session of Congress, but that repeal did not deprive the Circuit Court of the District of Columbia of any of the powers which were, by the act of the 27th of February, given to it by reference to the act of the 13th of February.

The Circuit Court of the District of Columbia is a court of the United States; and having jurisdiction over such a variety

of cases, the reports of its decisions cannot but be interesting; and the facility with which its errors may be corrected by the Supreme Court gives great weight to such of its decisions as have been acquiesced in.

The cases here reported were cases arising under the Constitution and laws of the United States, and the Constitutions and laws of Virginia and Maryland, including the common law as adopted by those States; and including also causes of admiralty and maritime jurisdiction, and seizures on land or water for breaches of the laws relating to the revenue and the laws of trade and navigation; appeals from the District Court of the United States for the District of Columbia; from the Orphans' Court in relation to guardians and the administration of the estates of deceased persons; and from the judgments of justices of the peace in civil causes within their cognizance.

In general, the cases which were carried up to the Supreme Court, by writ of error or appeal, *and affirmed*, are not here reported; — having been already reported among the cases decided by that Court; some few cases, however, which were reversed, will be found here reported as they appeared in the Court below.

As the Circuit Court for the District of Columbia is the tribunal to which is intrusted, either originally or by appeal, the execution of those laws which protect the personal liberty and property, not only of the citizens of the District, but of all the officers of the Government, from the highest to the lowest, residing therein, and of the members of both houses of Congress; and of all the citizens of the United States visiting this neutral ground, the common domain of all the States, it seems to be peculiarly important that the decisions of that tribunal be publicly known.

It is with this view that these Reports are now published.

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CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1801, AT ALEXANDRIA.

THE COMMONWEALTH OF VIRGINIA *v.* JACOB LEAP.

If upon a special verdict it does not appear that the offence was committed before the filing of the information, the judgment must be arrested.

INFORMATION for selling spirituous liquors contrary to the act of Assembly of Virginia, 26th December, 1792, § 4; (Pleasant & Pace's ed. of 1803, p. 203.)

Mr. Simms, for the defendant, moved in arrest of judgment, because it did not appear by the verdict that the fact was committed before the information was filed; and in support of his motion cited 2 Hawk. P. C. 334, and 4 Burr. 2471. The verdict found the defendant guilty of retailing spirituous liquors in the month of March, without naming the day, and expressly found that there was no evidence of his retailing liquors on the day laid in the information. The information was filed in the same month of March. He admitted that the jury may find a general verdict, although the fact be not proved to have been done on the day laid in the information; but if the jury find specially, the court are bound to take notice of the fact as found.

Mr. Mason, Attorney for the United States. The day is not material. 2 Hawk. P. C. 335, § 81. A different day may be proved. 1 Hale's P. C. 361; 3 Inst. c. 104, *Syer's case*, 230; Gilb. L. E. (Lofft,) Dublin ed. 1795, 870. The time laid in an indictment may be falsified to avoid a forfeiture.

The COURT arrested the judgment on the ground that it did not appear by the verdict that the fact was committed before the information was filed.

JOHN SUTTON v. JOHN MANDEVILLE.

Parol evidence cannot be given of a statement of an account by a Master in Chancery in a suit pending in another court.

In an action at law by one partner against the other the partnership book kept by the defendant is not evidence against the plaintiff, although it had been in his possession.

The defendant cannot set off a joint judgment recovered by himself and wife (for slander of the wife) against the plaintiff.

DEBT on a promissory note. *Nil debet*, and issue.

James Keith was sworn on the part of the defendant to prove that he was appointed a commissioner by the High Court of Chancery of Virginia to state the partnership accounts between plaintiff and defendant, and that there was a balance due from plaintiff to defendant.

Mr. Mason, for the plaintiff, prayed the Court to instruct the witness that he was not to say any thing to the jury on the subject of any statement of the accounts made by him as a commissioner, a bill having been filed in the High Court of Chancery of Virginia to compel a settlement of the accounts.

The COURT gave the instruction as prayed, because the report of the Commissioner was of no authority unless it had been ratified by a decree of the Chancellor; and if it had been so ratified, it ought to be produced and proved as a record from Chancery.

Mr. Swann, for the defendant, offered the books of the partnership to prove that the plaintiff had credit on the partnership books for the amount of the note. It was admitted that the books were kept by the defendant, but that the ledger in which it was credited had been in the possession of John Sutton, the plaintiff, but the entry was not in his handwriting, nor any proof offered that it was made with his consent.

The COURT refused to permit the book to go in evidence to the jury.

The defendant's counsel then offered to offset a judgment obtained against the plaintiff in an action of slander, by defendant and his wife, for slander of the wife.

Mr. Mason, for the plaintiff, objected that this judgment was in right of the wife, and could not be offset against a debt due from him in his own right. If the wife survives the husband the judgment survives to the wife. *Oglander v. Baston*, 1 Vern. 396; 2 Com. Dig. 85, tit. Baron and Feme, F. 1; *Bond v. Simmons*, 3 Atk. 20.

Mr. Swann, for the defendant. By the law of Virginia, 4th December, 1786, § 4, (ed. 1803, p. 37,) the plaintiff must allow all just discounts. *Picket v. Morris*, 2 Wash. 255. A discount may be produced at the trial.

 Moore v. Gadsby.

The judgment will not survive to the wife. A bond, if due to the wife *dum sola*, and reduced to a judgment before the death of the husband, will not survive to the wife, but go to the executors of the husband. *Obrian v. Ram*, 3 Mod. 189; *Miles's case*, 1 Mod. 179; *Butler v. Delt*, Cro. Eliz. 844.

The COURT refused to suffer the judgment of Mandeville and his wife to be given in evidence as a discount to the debt due by Mandeville alone.

JOSEPH NEALE v. GEORGE HILL.

A receipt for hogshead staves to be paid at a certain price is "a note for the security of money" within the Stamp Act of 1797.

ASSUMPSIT for goods sold and delivered. *Non assumpsit*, and issue.

The COURT, considering the following note as "a note for the security of money," refused to suffer it to go in evidence to the jury, because it was not stamped according to the Act of 6th July, 1797, § 1 and 13. [1 Stat. at Large, 527.]

The note was in these words, viz.: "Alexandria, December 15, 1798. Received of Mr. Thomas Carberry six hundred and fifty cart white-oak hhd. staves, at the rate of twenty dollars per thousand, and eighteen hundred barrel staves, at ten dollars per thousand, the which I promise to pay the said Thomas Carberry, or order, in all the month of April next ensuing. Witness my hand, day and date above written. GEORGE HILL."

Indorsed, "December 15th, 1798. Pay the within to Joseph Neale or order, and his receipt shall be good against

"THOMAS CARBERRY."

JOHN MOORE v. JOHN GADSBY.

Same point as in the preceding case.

ASSUMPSIT for hay sold and delivered. *Non assumpsit*, and issue.

The COURT refused to permit the note offered by the plaintiff to go in evidence to the jury, because it was "a note for the security of money," and not stamped agreeably to the Act of Congress of 6th July, 1797, § 1, 13. [1 Stat. at Large, 527.]

The note was in these words, viz.: "Received of Jno. More

 Ridgeway v. Ghequier.

twenty-three hundred and twenty wt. of hay, at seven pounds ten shillings per tun, to be paid in sixty days from this date. 2,320 wt. at 7s. 6d. per C. Dollars, 29.00. JNO. GADSBY.

"May 23, 1800."

 SIMON BROADWELL v. McClish & Wolves.

The fact that the plaintiff's counsel had made diligent inquiry and could not hear where the subscribing witness lived, is not sufficient to dispense with his testimony, if it appears that he was in the country.

ASSUMPSIT against the defendants, as indorsers of James Patterson's note.

There was a subscribing witness to the note, and in order to induce the Court to dispense with proof by the subscribing witness, *Mr. E. J. Lee*, counsel for the plaintiff, made affidavit that he had made diligent inquiry and could not hear where the subscribing witness lived.

The defendant produced a witness who testified that he saw the subscribing witness in Baltimore last February, and that he was working at his trade there.

The COURT refused to dispense with his testimony, and the plaintiff became nonsuit.

 MANDEVILLE & JAMIESON v. NATHANIEL WASHINGTON.

On a writ of inquiry the plaintiff's oath may be given in evidence of the amount of his claim.

ON writ of inquiry.

The COURT admitted an account supported by the plaintiff's affidavit to be given in evidence to the jury, it having been stated by some of the bar and admitted by all, that such has been the practice in the District Courts of the Commonwealth of Virginia.

 COATS RIDGEWAY v. BERNARD GHEQUIER.

A deposition taken in chief under a commission may be read in evidence, unless the other party can prove that the witness is within reach of the process of the Court.

A DEPOSITION of a witness residing in Baltimore taken under a

 Shean v. Towers.

dedimus, by virtue of the laws of Virginia, was offered by the plaintiff. The deposition was taken in chief. The COURT decided that the deposition, being taken in chief, must be read, unless the defendant could prove that the witness was within reach of the process of this Court. The defendant not being able to prove that, the deposition was read. (See *Collins v. Lowry*, 2 Wash. 75.)

 JOHN ADAMS v. MORDECAI MILLER.

Assumpsit lies by the apprentice against his master who takes the apprentice under an order of the Court to bind him out, although no indentures are executed.

ASSUMPSIT for not teaching the plaintiff the trade of a silversmith, and to read and write, according to promise.

The Corporation Court of Alexandria had ordered the overseers of the poor to bind out the plaintiff to defendant. The COURT instructed the jury, that the defendant having taken the boy under the order of the Court, although there was no indenture, the law raises an implied promise on the part of the defendant to comply with the terms of that order.

 WHETCROFT'S ADMINISTRATOR v. JOHN DUNLOP.

A special demurrer will not be admitted to set aside an office judgment.

THE COURT refused to admit a special demurrer to the declaration to be filed on setting aside the office judgment. The cause of demurrer assigned was the want of *profert* of the letters of administration.

 SHEAN v. TOWERS.

If no appearance-bail be required, the Court will not require special bail, on setting aside the office judgment.

MR. SWANN prayed that the defendant might not be permitted to set aside the office judgment without giving special bail, and stated that he had evidence to prove the account to entitle him to special bail. There was no appearance-bail required.

The COURT refused to rule bail.

JAMIESON & ANDERSON v. AMOS ALEXANDER.

Although the contract offered in evidence vary from that stated in the special count, the receipt for the purchase-money at the bottom of the contract is evidence on the money counts.

ASSUMPSIT on a special promise to deliver flour, and for money had and received.

Mr. Favv, for the defendant, objected to the contract produced, because it varied from that declared on, — one being a promise to deliver on demand, and the other in one week. 1 Esp. 140.

Mr. Simms, for the plaintiff, admitted the variance to be fatal as to the first count, but contended that the receipt at the bottom of the contract for the whole purchase-money was good evidence on the count for money had and received; to which the COURT assented.

STEPHEN COOKE v. WILLIAM MYERS.

In debt, by the lessor against the assignee of the lessee, the plaintiff is not bound to show an assignment by deed acknowledged or proved and recorded agreeably to the fourth section of the Act of 13th December, 1792, "for regulating conveyances."

DEBT for rent, by lessor against assignee of lessee.

The plaintiff produced a paper signed by the defendant, in which he agreed to take the residue of Thompson's lease, and bound himself to Thompson in the penal sum of to pay all the rents which should become due to the plaintiff, Dr. Cooke, upon his lease to Thompson.

Mr. Swann, for the defendant, objected that it was not competent evidence to prove an assignment from Thompson to Myers, and cited the Act of Assembly, p. 165, (ed. 1803, p. 157.)

Mr. Simms, for the plaintiff, cited 1 Esp. 247 (large ed. 220.) *Cotes v. Wade*, 1 Lev. 190; *Pitt v. Russell*, 3 Lev. 19, and *Watson v. Alexander*, 1 Wash. 351, and insisted that the paper produced was in this case evidence proper and competent to go to the jury, to prove an assignment; and of such opinion was the COURT.

Mr. Swann took a bill of exceptions, but never carried the cause to the Supreme Court.

UNITED STATES, at the instance of the MARINE INSURANCE COMPANY v. THE PRESIDENT AND DIRECTORS OF THE BANK OF ALEXANDRIA.

If the right of the party applying for a mandamus be not clear, or if he have an adequate legal remedy, equivalent to a specific remedy, the court will not grant the mandamus.

On the first day of this term, the President and Directors of the Marine Insurance Company obtained a rule on the President and Directors of the Bank of Alexandria, to show cause on the sixth day of this term why a mandamus should not issue commanding the President and Directors of the Bank of Alexandria to admit the President and Directors of the Insurance Company to subscribe for twenty-five of the unsubscribed shares of the augmented capital stock of the Bank.

Mr. Simms, for the Bank, showed for cause,

That the Bank did not think it expedient that the new shares should be filled. That the Bank is not compellable to open their books now for subscriptions. That the Bank has no right to open them.

By the Act of incorporation of the Bank, November 23d, 1792, the stock was to consist of 750 shares of 200 dollars each, to be paid, ten dollars in specie on each share at the time of subscribing, forty dollars within fifteen days, twenty-five dollars in thirty days, fifty dollars in sixty days, and the remaining seventy-five dollars in one hundred and twenty days, after the election of the Directors.

On the 7th of December, 1792, the subscription was opened, and filled the same day. On the 27th of January, 1793, the first directors were chosen. On the 5th of December, 1795, the Act passed for augmenting the capital stock, by which three hundred and fifty thousand dollars were to be subscribed in shares of two hundred dollars each; the books were to be kept open thirty days, or until the whole shares should be filled; and if, at the end of the thirty days, a greater number of shares should be subscribed for than the Act allowed, the surplus should be averaged and deducted from the subscriptions, *pro rata*, so that each subscriber should retain at least one share. The whole number of new shares was to be 1750. The books were kept open one hundred and twenty days after the expiration of the first thirty, and were again opened and kept open until 7th April, 1797; 554 shares were subscribed in the thirty days and 296 shares were subscribed after the thirty days.

The payments were to be made in the same number of days

from the time of opening the subscription as are limited in the first Act, after the time of election of the directors. Perhaps they had a right to keep the subscription open until the last payment, but not longer. (Co. Lit. 381, as to the construction of statutes); 4 Bac. Ab. 645, 652.

The inconvenience of the construction contended for, would be very great, as every new subscription requires a settlement of the affairs of the Bank, because a new subscriber is not entitled to any part of the profits arising before he subscribed.

Mr. Chapin, Cashier of the Bank, testified that he received orders from the President of the Bank not to receive any more subscriptions, but did not recollect when he received those orders. It was while *Mr. Herbert* was President.

On the second opening of the books, subscribers paid by instalments; afterwards they paid the money down.

Mr. E. J. Lee, *Mr. C. Lee*, and *Mr. Mason*, in support of the rule.

A mandamus is the proper remedy. No suit at law could place the Insurance Company in the situation of stockholders of the Bank. It issues to any corporation requiring them to do some particular thing therein specified which appertains to their office and duty. 3 Black. Com. 110. The Insurance Company have a right to be stockholders; it is a function, and attended with emoluments. No specific legal remedy exists. *Rex v. Barker et al.*, 3 Burr. 1265.

It lies to admit a person into a company of merchants. *Rex v. Turkey Company*, 2 Burr. 999. It has been said that the act for augmentation could not be carried into effect because the payments were to be made in a limited time after the opening of the books; but that difficulty is avoided by the payment of the whole subscription at the time of subscribing, and in this case the Insurance Company tendered the whole payment at once.

As to the inconvenience to the Bank, it may be said that the inconvenience to the public from the want of a larger capital stock in the Bank, is as great or greater than that which the Bank would sustain by being obliged to settle their accounts, &c.

The Bank has no discretionary right to refuse. The words of the Act are imperative. The books shall be kept open thirty days, or until the whole number of shares is filled. The Bank officers cannot say that they had a discretionary right to close at the end of thirty days, or to keep the books open as long after as they pleased, and then close before the whole shares were filled. They have given a construction to the Act by keeping the books open after the thirty days, and are therefore obliged to continue them open until the whole number is complete.

The Bank has accepted the act, and is therefore liable to any inconveniences which may result.

Buller, N. P. 199. It is a writ of right, and cannot be refused. It is to compel an obedience to its charter. It issues to private corporations, as well as to those who are concerned in the administration of public justice, as in the case of *Rex v. Turkey Company*. That corporation had no judicial powers.

In *Rex v. Blooer*, 2 Burr. 1043, a mandamus was ordered to a pensioner; and in *Rex v. Askew et al.*, 4 Burr. 2186, it was directed to the College of Physicians to admit a person to practise physic.

By the preamble of the Act of 1792, the Bank appears to have been instituted for the benefit of the public, and not of the individual stockholders. By first section, the books shall be kept open. The same reasons are given in the preamble to the second Act. The books must be kept open thirty day to prevent monopoly, and if the shares are not all filled in the thirty days, they must be kept open until they are all filled.

There can be no doubt of the power of this Court to grant the mandamus. The subscription is to neither more nor less than three hundred and fifty thousand dollars, and the act says the subscription shall be taken. The expression, the subscription "shall be kept open thirty days, or until," &c., means that it shall be kept open thirty days at all events, and if the whole shares are not taken up in that time it shall be kept open until they are. The public have a right to insist that the stock should be augmented, if subscribers offer.

The third section of the second Act, which says the payments shall be made according to the first Act, cannot be carried into operation. The Act must therefore be taken as if no such section had been inserted; and in such case the Bank, under its authority to make by-laws and regulations, might have ordered the mode of payment. Unless the subscriptions are now opened, the capital can never be augmented, because Congress have pledged themselves to the Bank of the United States.

Mr. Swann, contra.

A mandamus will not lie but where the government, or the public, or the administration of justice, is concerned. The cases in 3 Bac. Ab. 530, are all upon the ground of the applicant being a public officer. So is the case in 6 Mod. 18; Lord Raymond, 540, 560. In Jacob's Dic. tit. Corporation, a corporation is distinguished from a body politic. There are public corporations and private corporations. A private corporation is like a private individual, and liable to process as a natural person. This is not a public concern. The people of Virginia were not interested in it.

The case of *Rex v. Bloor* concerned the religion of the country. The case in 3 Burr. 1650, concerned education, which is a public concern. In the case in 4 Burr. 2188, the College of Physicians had power to hold a court. A mandamus will never be granted where there is another specific remedy. 3 Black. Com. 110; 1 Wils. 12, 21, 76, 125, 206, 283, 305; 2 Strange, 1082; *Rex v. Bishop of Chester*, 1 T. R. 396, 404. The Bank is a private corporation; the remedy is by a bill in chancery, or by an action on the case. *The King v. Bank of England*, Douglas, 523. The court will not grant a mandamus if the right of the applicant is not clear, and if he has another remedy equivalent to a specific remedy.

The words of the two laws are different. The first law is imperative: the books shall be kept open until the whole number of shares shall be subscribed. The second law says thirty days, or until the whole number shall be subscribed, thereby leaving it discretionary with the Bank.

Mr. C. Lee, in reply.

This is a public institution, because all persons have a right to subscribe as long as a share remains unsubscribed for. Buller, N. P., 149, tit. Mandamus.

There is no distinction between a public and a private corporation. In the case of the *Turkey Company*, there was nothing said of a power to hold a court. It makes no difference. 1 Lev. 123; 1 Keble, 625, 629.

In the case in Strange the court granted the mandamus, although a *quare impedit* would lie. In 1 T. R. 404, Buller, J. says it must be a legal as well as a specific remedy which will prevent a mandamus. The courts are bound to see that corporations properly exercise the powers vested in them by their charters. A court of law will not send an applicant to a court of chancery when it is confessed that a court of law is competent to give a remedy. Besides, here is no contract on which to ground a suit in chancery.

In the case in Douglas, the right of the applicant was not clear, and that is the ground of the judgment of the court. The court only exercised its discretion.

The application for the mandamus rests on two grounds:

1st. Whether the right of the applicants to be stockholders is clear. 2d. Whether this is the proper remedy.

KILTY, C. J. I shall not go at large into the reasons which influence me as to the first question, because it may hereafter be a subject of discussion. But my present impressions are, that the right is sufficiently clear.

With regard to the second point, I feel some difficulty to de-

cide. An action on the case may possibly afford a remedy, but it is by no means clear that it will afford a specific remedy equivalent to the one now sought for, or commensurate with the right of the applicants.

Under this doubt, when I consider that a denial at this time will oblige the claimants to resort to a remedy that may not be effectual, and that by granting the *mandamus nisi* and *de bene esse*, open to all objections on the return, the Bank will not be concluded. My opinion is, that the rule should be made absolute for a mandamus to admit the Marine Insurance Company to subscribe the twenty-five shares prayed for, or to show the reasons why they are not admitted. This is also on the ground of the facts being by proof and admission sufficiently before the Court.

MARSHALL, J., was of opinion that the rule ought to be discharged, without costs.

CRANCH, J. It does not appear to me that the right of the Insurance Company is sufficiently clear; and if they have the right, they have a legal remedy by action on the case adequate to a specific remedy; for if, on a trial at law, they establish their right, a jury will give them damages, which will enable them to purchase the shares at market; and the bank will be obliged to open their books again, or suffer the constant inconvenience of paying damages and costs to every person who wishes to become a subscriber. I am therefore for discharging the rule, but without costs.

In consequence of this opinion of the Court, the bank opened their books for subscription.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1801, AT WASHINGTON.

URIAH FORREST *v.* SAMUEL HANSON.

A clerk of this Court is not entitled to sue by attachment of privilege.

ACTION on the case for slander.

The plaintiff, being clerk of the court, had sued out an attachment of privilege, and now moved for a rule upon the defendant to plead on some day during the present term.

It was contended, on the part of the plaintiff, that the privileges of the officers of courts is a part of the law of Maryland, which, by the Act of Congress concerning the District of Columbia, 27th February, 1801, § 1, [2 Stat. at Large, 103,] was adopted as the law of this part of the district. That the Legislature of Maryland had acknowledged the principle, by passing an Act, 1799, c. 29, restraining the application of it in some cases. That, in Maryland, it is not a matter of favor, but of right, to rule the defendant to plead at the first term. The oldest writers consider it as part of the Common Law of England. 4 Bac. Ab. 215, 218, tit. Privilege, B.; 2 Inst. 55, 551; 4 Inst. 71; Bracton, 99, 112.

It is the privilege of the Court, and not of the officer. It is founded on the same reason and principle as the privilege of witnesses, jurymen, &c., to be free from arrest. 4 Bac. Ab. 222, 223.

No Court has power to issue a process not authorized by common, or statute law; the attachment of privilege is not authorized by statute law; it must therefore have issued as a common law process. Salk. 543, 544.

In Maryland an attorney must be sued by bill of privilege; if he does not appear, he will be forejudged; and then being no longer an attorney, a *capias* may issue against him. *Brown v. Van Braam*, 3 Dallas, 344.

The Act of Congress respecting the Courts of the United States authorizes them to make rules not repugnant to the laws and constitution of the United States.

On the part of the defendant, it was said that the privilege of the officers of the courts at Westminster is no part of the common law. It depends altogether upon the usage and custom of the courts. It extends only to the Court of King's Bench, the Common Pleas, the Exchequer, and Court of Chancery. It is not claimed by all Courts of Record, as such. The privilege of officers of the Common Pleas must be certified to the King's Bench, and that of the officers of the Exchequer must be proved by the red book. 17 Vin. Ab. 518, 530, 531, tit. Chancery; art. 12 and 16, Stenary Courts; 4 Bac. Ab. 219, 224; System of Pleading, 343, 348. It is to be presumed that it was originally granted to certain courts only, by the original grant or charter by which the courts were erected. By the charter to Lord Baltimore, he was empowered to erect courts, and if the privilege is claimed by the courts in Maryland, it may be presumed to be claimed under the charter, § 7. See the Act of Assembly, 1637; 2 Richardson's Practice Com. Pleas, 176, for the form of a plea of privilege.

KILTY, C. J. It is the unanimous opinion of the Court that the rule should not be laid, and that the privilege is not to be allowed. The Court consider that the privilege, as exercised by certain courts in England, does not depend on any principle of the common law, extending, generally, to all judicial bodies, but is in the nature of a particular grant or charter to a certain court. The exercise of the privilege in the state of Maryland depends on the like principle, and flows from a grant or charter to the courts there. The adoption of the laws of Maryland in this county, under the law by which this Court is established, does not give to the Court the privileges which have been thus derived to the courts of Maryland, and therefore they are not authorized or bound to extend to their officers the benefits or disadvantages of the privilege contended for; and have not the power to extend it to the prejudice of other persons. See 2 Hawk. P. C. 2, 4, and 5.

UNITED STATES v. JOHN CLANCEY.

Upon indictment for larceny under the Act of Congress, the owner of the goods stolen is a competent witness after having released to the United States his half of the fine.

INDICTMENT, under the Act of Congress, for stealing the goods of Luke O'Dea.

Parrot v. Habersham.

The Attorney for the United States offered the owner of the goods as a witness. The counsel for the prisoner objected, because, by the Act of Congress, half of the fine is to go to the owner.

The witness executed a release to the United States of his half of the fine, whereupon he was sworn.

RICHARD PARROT v. JOSEPH HABERSHAM, Garnishee of IGNATIUS
PIGMAN.

The certificate of the presiding magistrate is not necessary to an exemplification of the records of Virginia and Maryland, for the purpose of obtaining executions under the 13th section of the act of 27th February, 1801.

MOTION to quash an execution issued upon an exemplification from Montgomery county, in Maryland, because the record was not authenticated by a certificate of the Chief Judge, or presiding magistrate. The motion was overruled by the Court, because the exemplification was such an one as seems to be contemplated. by the 13th section of the act concerning the District of Columbia, of 27th February, 1801. [2 Stat. at Large, 103.]

CIRCUIT COURT OF THE UNITED STATES.

ALEXANDRIA, JULY TERM, 1801.

UNITED STATES *v.* JOHN HAMMOND.

The jurisdiction of the United States over the District of Columbia vested on the first Monday in December, 1800.

An indictment at common law, for larceny, can be sustained in Alexandria county, although the punishment has been altered by statute.

Judgment cannot be arrested because there was no previous Court of Examiners.

JOHN HAMMOND was, at the last term, indicted at common law, and convicted of stealing the goods of Margaret Lefferty, on the 26th of February, 1801. A motion in arrest of judgment was made and continued to this term. The grounds of the motion were these: — 1. That the offence was not committed within the jurisdiction of this Court; the theft having been committed on the 26th of February, 1801, and the Act of Congress which erected this Court having been passed on the 27th of February, 1801. 2. The indictment does not conclude against any statute. 3. There was no previous court of examiners, according to the laws of Virginia.

CRANCH, J. As to the first exception, I am of opinion that the jurisdiction over this district, vested in Congress on the 1st Monday of December, 1800, the day on which, by law, the district became the seat of government. That the crime was therefore, an offence against the United States, and committed within the jurisdiction of this Court.

The second section of the Act of Cession, passed by the Legislature of Virginia, on the 3d of December, 1789, is in these words, viz., "That a tract of country not exceeding ten miles square, or any lesser quantity, to be located within the limits of this state, and in any part thereof, as Congress may by law direct, shall be, and the same is hereby forever ceded and relinquished to the Congress and government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil as of per-

sons residing, or to reside thereon, pursuant to the tenor and effect of the 8th section of the 1st article of the Constitution of government of the United States." That article has the following words: "The Congress shall have power to exercise exclusive legislation over such district, not exceeding ten miles square, as may, by the cession of particular States, and the acceptance of Congress, become the seat of the government of the United States."

The jurisdiction ceded by Virginia could not vest or take effect until Congress should be able, constitutionally, to exercise it; which they could not do, under the article of the constitution referred to by the act of cession, until the district should become the seat of the government of the United States.

The act of cession, by referring to the constitution, must be understood to mean, that Virginia ceded a jurisdiction which was to vest, or take effect when the district ceded should become the seat of government. The "tenor and effect" of that section of the constitution is, that Congress should immediately, upon taking possession of its permanent seat, have the sole and exclusive jurisdiction over it; and the cession is expressly stated to be according to that "tenor and effect."

It seems clear that Virginia did not part with her jurisdiction until Congress could exercise it, which, by the Constitution, could not be until the district became the seat of the government.

On the first Monday of December, 1800, the District of Columbia, by law, and in fact, became the seat of the government of the United States. The words of the second section of the Act of Cession could not well be stronger or more effective than they are. The tract of country which Congress should locate, was "thereby forever ceded and relinquished to the Congress and Government of the United States in full and absolute right and exclusive jurisdiction as well of soil as of persons residing and to reside thereon."

Before this right of exclusive jurisdiction could absolutely vest in the United States, it was necessary, by the Act of Cession, and by the eighth section of the first article of the Constitution of the United States, that three events only should happen: 1st. That the cession should be accepted by Congress. 2d. That it should be located and defined; and 3d, That the district so accepted, located, and defined, should become the seat of government of the United States. All these events had happened on the first Monday of December, 1800, being the day appointed by law for the removal of the seat of government. On that day, therefore, all the preliminary events having happened, the District of Columbia became vested in the Congress and Government of the

United States, according to the impressive words of the Act of Cession, "in full and absolute right and exclusive jurisdiction as well of soil as of persons residing or to reside thereon." There can be no doubt in this case, if the fourth section of the Act of Cession does not control the general expressions of the second section. Let us then consider what is the effect and operation of the fourth section. Here it becomes necessary to recollect the legal rules of construction which are applicable to statutes and grants; one of which is, that the exception from the general terms of a grant shall be construed strictly. Another is, that in the same instrument or the same statute, the same words are supposed to mean the same thing, and different words not necessarily conveying the same idea, are supposed to mean different things. No repugnancy or absurdity shall be presumed, especially in a statute, if the words will bear such a construction as to avoid it. All instruments and statutes shall be so construed, *ut res magis valeat, quam pereat*.

Statutes being written with much caution, and enacted with great solemnity, every word is supposed to have been maturely considered, and to have an appropriate meaning. An act by which a State parts with a portion of its territory and jurisdiction, is one of the most important acts which a State can perform. It is an act which cannot, like the ordinary acts of legislation, be repealed, and we are therefore to presume that the legislature would be peculiarly cautious in the selection of words to express its meaning.

The general expressions of the second section of the Act of Cession are, in some measure, affected by the proviso contained in the fourth section, which is in these words, viz.: "Provided that the jurisdiction of the laws of this Commonwealth over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine, until Congress, having accepted the said cession, shall by law provide for the government thereof, under their jurisdiction, in manner provided by the article of the constitution before recited."

We have before seen that by the second section of the Act of Cession, the jurisdiction was to vest in Congress as soon as they should constitutionally become competent to exercise it, which period has, by subsequent events, been ascertained to be the first Monday of December, 1800.

If the expression in the proviso, "jurisdiction of the laws of this Commonwealth over the persons and property of individuals," is supposed to include the whole idea of "full and absolute right and exclusive jurisdiction," which is ceded by the second section, then the legislature would in effect say, that we cede to the Congress and Government of the United States a certain district, the

full and absolute jurisdiction over which shall vest in Congress as soon as the said district shall become the seat of the government of the United States; provided, nevertheless, that the said jurisdiction shall not vest on the happening of that event, but on a subsequent act which is to be done by Congress, under, and by virtue of, the jurisdiction which we transfer. The absurdity of this construction is evident, and we must from thence infer that the expression, "jurisdiction of the laws over the persons and property of individuals," was not intended to convey the same idea as the former expression, "full and absolute right and exclusive jurisdiction as well of soil as of persons."

It must be evident that the expression in the fourth section is far less comprehensive than that in the second. The terms "full and absolute right and exclusive jurisdiction as well of soil as of persons," comprehend the whole complex idea of sovereignty; but the expression, "jurisdiction of the laws over the persons and property of individuals," conveys only a part of that idea. There is certainly a difference between the whole sovereign authority of an independent state, which comprehends the political as well as legislative or municipal jurisdiction, and the simple effect of the laws enacted under and by virtue of its municipal or legislative power. When a State, possessed of sovereign authority, transfers to another State a part of its territory, in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, it parts with its whole rights of sovereignty over such portion of its territory. It may, if it chooses, stipulate that the laws which were the rules of conduct in such portion of territory at the time of its cession, shall continue in force, as rules of conduct, until altered by the State to which the territory is transferred; but in such case, those laws would not derive their obligatory force from the continuance of the jurisdiction of the former sovereign of the territory, but from the compact between the two sovereign States, by which they became the laws of its new sovereign.

The proviso in the fourth section appears to me to be nothing more than a stipulation that the laws of Virginia, as they should exist at the time of the actual transfer of the jurisdiction, should remain in force as law, until Congress should otherwise provide, under their jurisdiction. Virginia has stipulated, and the United States by their act of acceptance have assented; it is a mere matter of compact between two sovereigns having full power to contract upon that subject. The jurisdiction of the laws, can mean nothing more than the operation of the laws; and so it was understood by Congress, who, in their act of acceptance, have said, "Provided that the operation of the laws of the State within

such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide."

What then is the operation of a law? A law is always in operation as long as it is the rule of conduct of the subject upon which it is intended to operate; that is, as long as the subject is bound to obey it, or conform his conduct to its provisions. The operation of a law can be nothing more than the obligation of a law. A law ceases to operate when it is no longer obligatory, and as long as it is obligatory it is in full operation. The laws would not cease to operate upon the citizens of a State, although it should happen that there was neither a court, a judge, or an officer of justice to punish a breach of those laws.

In England it was formerly the case that upon every demise of the crown, every commission of every officer of justice expired; but it was never suggested that the operation of the laws was in any degree affected thereby. There is a great difference between the operation of the laws, and the execution of the laws. A law may be in operation, and yet from a defect of courts or officers of justice, it may not be possible to carry it into execution. The operation of a law is a part of its very essence. It ceases to be a law when it is no longer operative. Congress may pass an act whose operation may commence on a future day, but until that day arrives it does not become a law, it is only an act which at a future day is to become a law. If, in the mean time, before its operation commences, a person does an act which would be contrary to that Act of Congress if committed after the time limited for its commencement, still that person commits no crime, no offence, and has done nothing against law.

If Congress should pass an act, and declare that the operation of that act should commence on the first day of January next and continue until the first day of July following, it would not become a law until the first of January, and it would cease to be a law on the first of July. Operation, therefore, is an essential quality of every law, and means no more than the moral power, or obligation of a law, or that quality by which the law becomes binding upon a man as a rule of his conduct.

If, then, the jurisdiction of the laws means the operation of the laws, if the operation of the laws is simply their moral power or obligatory quality, and if those laws derive their binding force or obligation, not from any remnant of the jurisdiction of Virginia, but from the Act of Congress by which that stipulation was agreed to, then it will follow that the jurisdiction of the laws of Virginia may not cease or determine, and yet Virginia may have parted with every shred of jurisdiction over the territory.

But it has been said, that if we take the laws of Virginia, we must take their courts and their officers of justice also. I consider it unnecessary to give an opinion on that subject, as in the case now before the court it will be sufficient if we show that the jurisdiction over this district was vested in Congress on the 26th of February, 1801. But it may well be doubted whether the courts or officers of justice constitute any part of the laws of Virginia, or of their jurisdiction or operation, within the meaning of the term laws, as used in the Act of Cession and acceptance. It is even doubtful whether an act of assembly constituting a court, is properly speaking a legislative act, or can be called a law. It seems more like a charter or grant. The appointment of judges and other officers is certainly not a legislative act, nor would it become so by being made by a legislative body.

It has been said also that as the jurisdiction of the laws of Virginia was not to cease or determine, so the powers of the courts, judges, and other officers of justice must continue and be coöperative, or the laws could not operate. But I trust I have already shown that the operation of the laws does not depend upon the existence of courts or officers of justice, whose only business is to enforce the execution of the laws.

The reasons of inserting the fourth section in the Act of Cession, seems to have been that the inhabitants of this district should not be without laws, from the time of the transfer of the jurisdiction, until Congress should have leisure to frame a body of laws for their government.

It was foreseen that as soon as the District of Columbia should become the seat of the government, the operation of the laws of Virginia must cease. It might be supposed that it would take Congress a long time to form a complete system, but it would not take many days to erect a court and establish the necessary offices for carrying those laws into effect. There was therefore little or no reason for withholding the jurisdiction, if the operation of the laws could be continued consistently with its transfer. That the Legislature of Virginia thought this might be done appears from the expressions in the fourth section, "until Congress, having accepted the said cession, shall, by law, provide for the government thereof under their jurisdiction, in manner provided by the article of the Constitution," &c.

By the Constitution, Congress could not exercise exclusive legislation over the district until it had become the seat of government. Congress must have the jurisdiction before they could constitutionally pass a law "under" that jurisdiction. Or if Congress had, before its removal to the district, passed an act for its government to become operative when it should become the seat of

Commonwealth of Virginia v. Hooff.

government, still the jurisdiction must vest before the act could be of effect ; so that the vesting of the jurisdiction could not be the consequence of such an act.

I must confess that when this question was first suggested, I was inclined to think that the jurisdiction of Virginia did not cease until the passing of the Act of Congress on the 27th of February, 1801. But upon an accurate comparison of the Act of Cession with the Constitution and the act of acceptance, I am clearly of opinion that the jurisdiction was completely vested in Congress on the first Monday of December, 1800.

As to the second reason alleged in arrest of the judgment, viz., that the indictment does not conclude against any statute, it seems to be without foundation. I have no doubt that an indictment at common law is good. It was urged that the common law was, by the Convention in 1776, declared to be in force in Virginia until it should be altered by Act of Assembly ; and it was contended that it had been altered in this case by that Act of Assembly which authorizes a punishment for larceny different from that which the common law inflicted. But that act contains no negative words by which the common law punishment is excluded, and I think the common law cannot be altered without such negative words.

As to the third exception, namely, that there was no previous court of examiners, I imagine it is a fact out of the record, and which cannot be alleged in arrest of judgment. The record, in this case, does not notice any proceeding prior to the indictment, and you might as well allege an informality in the warrant which issued to apprehend the criminal, or in the *mittimus* by which he was committed.

I am therefore of opinion that the judgment must be entered.

MARSHALL, J., concurred in this opinion.

KILTY, C. J., dissented.



COMMONWEALTH OF VIRGINIA v. LAWRENCE HOOFF.

If the information upon a by-law state that the penalty accrued to the commonwealth, when, by charter, it accrued to the town, the judgment must be arrested.

INFORMATION, for keeping a slaughter-house in the town of Alexandria, contrary to a by-law of the corporation.

The Court arrested the judgment on the ground that the inform-

ation stated that the penalty accrued to the Commonwealth. By the act of incorporation of Alexandria, all penalties for breaches of by-laws were to be for the use of the town, and to be levied by distress and sale of the offender's goods.

COMMONWEALTH OF VIRGINIA v. JOHN SMITH.

An information may be amended by stating that the penalty accrued to the town instead of the commonwealth.

INFORMATION for keeping a slaughter-house in Alexandria contrary to a by-law of this corporation.

Mr. Mason, Attorney for the United States, moved for leave to amend the information, by stating the penalty to accrue to the town of Alexandria, instead of the Commonwealth. He stated it to be every day's practice, and cited 2 Hawk. 348. *The King v. Wilkes*, 4 Burr. 2527, 2566.

Mr. Simms and *Mr. E. J. Lee*, for defendant, agreed that informations might, at common law, be amended in the same manner as declarations, but contended that the amendment now proposed was such an one as could not be made in a declaration at common law. The amendment intended was matter of substance. 1 Bac. Ab. 102; *Cope v. Marshall*, Sayer, 234.

An amendment, alleging a new right of action, was refused. 1 Crompt. Prac. 105. A declaration against executor in *debet* and *detinet* shall not be amended. 1 Bac. Ab. 97, 98. An amendment ought not to be made after the term next after the filing of the declaration. 1 Wilson, 149; 1 Crompt. Prac. 105. After plea no new count can be added. Sayer, 97, 151, 172; 1 Crompt. Prac. 106. In the case of *The King v. Wilkes*, Lord Mansfield said no amendment in matter of substance ought to be made. The reason why he permitted an amendment in that case was, that the defence was not altered, nor the charge varied. If the amendment would make any difference in the judgment, it ought not to be admitted. The proposed amendment changes the parties.

Mr. Mason, in reply.

The practice has been relaxed since the time of the authorities read by *Mr. Lee*. The proceedings in civil suits may be amended at any time before trial. The question, to whom the penalty is to

accrue, has nothing to do with the offence, nor does it alter the plea. 2 Hawk. 397. The conclusion from the case in Hawkins is, that when a man is convicted of the offence, and the forfeiture incurred, if the judgment state the forfeiture as accruing to a wrong person, the judgment may be corrected. In the cases of *King v. King*, and *King v. Charlesworth*, in Burrow's Reports, the amendments were of substance. *The King v. Holland*, 4 T. R. 457, 458.

KILTY, C. J., and CRANCH, J., allowed the amendment to be made.

MARSHALL, J., *contrd.*

The grounds upon which the Court allowed this amendment were, that it was not in a matter of substance. An information is in the nature of an indictment. The object is the punishment of the offender. The *fact*, therefore, is the substance of the charge, and the person to whom the benefit is to accrue is immaterial. It differs from an action of debt brought by the Commonwealth for the penalty. There the right of action is in consequence of the clause designating to whom the penalty shall accrue. It is part of the plaintiff's title; and, if by law, the penalty did not accrue to the plaintiff, he could not recover. But, here the offender ought to be convicted whether the penalty accrue to the Commonwealth or not.

MANDEVILLE & JAMIESON v. ALEXANDER MACKENZIE.

In order to charge an indorser in Virginia, it is necessary for the plaintiff to show that he instituted his suit against the maker in due time, and prosecuted it diligently to an ineffectual execution.

ASSUMPSIT by the indorsee against the indorser of a promissory note made by John McIver, payable to the defendant, and by him indorsed to the plaintiff. The note was payable on the 19th of February, 1797, and protested for non-payment on the 20th.

The jury found a special verdict in these words, namely: "We find the note in the declaration mentioned in these words, namely: We find the indorsement, &c. We find that the plaintiffs instituted a suit in the Court of Hustings in the town of Alexandria, against the said John McIver, and obtained a judgment thereon against him. We find that the said judgment has not been paid, or any way satisfied. We find, that before the commencement

of this suit, the said John McIver became insolvent, and took the oath of an insolvent debtor, according to law. We find, that after the protest of the said note, and before the plaintiffs commenced suit against the said McIver, the plaintiffs received from said McIver, in part payment of said note, the following sums, namely: March 9th, 1797, \$100; March 10th, \$73,34; June 30th, \$30. If the law be for the plaintiffs, we find for the plaintiffs \$82.13 damages; if the law be for the defendant, we find for the defendant."

CRANCH, J. The contract of the assignor is to this effect, that he will repay the money to the assignee if the assignee cannot obtain the money from the promissor, having used due diligence therefor. The plaintiff, to entitle himself to recover, must make out his case; that is, he must show that he has not obtained the money from the maker of the note, and that he has used due diligence. It is admitted that a suit, prosecuted to judgment and execution, is, in Virginia, a necessary part of that diligence, (unless, perhaps, it can be shown that the maker was insolvent, or had run away,) but it is not the whole of due diligence. The plaintiff must show further that he prosecuted his suit in a reasonable time, that the execution has been delivered to the proper officer to be served, and that it has been ineffectual. This I take to be as necessary a part of the plaintiff's case, as it is to show that he brought a suit; for the defendant's engagement is only conditional, and the condition is precedent. The jury have not found at what time the suit was brought against McIver, but they have found that it was not brought before the 30th June, 1797. They have not found that any execution was taken out upon that judgment, nor have they stated whether McIver became insolvent before or after the judgment was rendered against him. They have only found that he became insolvent before the suit was brought against the present defendant, McKenzie.

The fact of due diligence must have been necessarily in issue, as part of the plaintiff's cause of action, and the jury not having expressly found that due diligence was used, and not having found facts enough for the Court to decide whether such diligence was used or not, I think a *venire facias de novo* ought to be awarded.

KILTY, C. J., and MARSHALL, J., assented.

The authorities cited were, *Lee v. Love*, MS., (since reported in 1 Call, 497,); Kyd, 208; Strange, 745; 1 Wilson, 48; 1 T. R. 167; 1 Salk. 132; *Mackie v. Davis*, 2 Wash. 219; 2 Lord Raymond, 758; 3 Burr. 1522; Kyd, 165; Buller, N. P. 271; 2 Str. 1145.

STEPHEN COOKE'S LESSEE v. NICHOLAS VOSS.

In ejectment upon re-entry for non-payment of rent by tenant in fee, the plaintiff need not show that his own title was in fee, if he shows a possession of forty-four years; nor that there were not sufficient goods on the premises, within the first thirty days after the rent became due, whereof distress might be made; nor that he demanded the rent on the day it became due; nor on what part of the lot the rent was demanded.

THE jury found a special verdict, which stated, That William Thornton Alexander and those under whom he claimed, were seized and possessed of the lot of land in the declaration mentioned for the space of about forty-four years next before the 25th December, 1794, and being so seized and possessed on the said 25th December, 1794, by deed of bargain and sale of that date, conveyed the said lot to the said Stephen Cooke, the lessor of the plaintiff, who being seized and possessed thereof on the 25th of May, 1795, by his deed of that date, conveyed the same to Edward Ramsay in fee simple, he "yielding and paying for the same on the first day of January yearly £16 Virginia currency as an annual rent to the said Stephen Cooke, his heirs and assigns. This deed contained the usual clause of distress, and re-entry, if the rent should be in arrear thirty days, and sufficient goods and chattels should not be found upon the said premises, of which distress and sale might be made to satisfy the rent.

By virtue of which deed the said Edward Ramsay entered into the said lot of land, and was seized and possessed thereof. That on the 1st day of January, 1798, there were in arrear £16 for the rent which became due on the 1st day of January, 1797, and £16 for the rent which became due on the 1st day of January, 1798. That on the 31st day of January, 1798, about fifteen minutes before the setting of the sun, the said Stephen Cooke went upon the said lot and demanded payment of the rent of £16 due on the 1st day of January, 1797, and also of the rent of £16 which became due on the 1st day of January, 1798; and continued on the said lot of ground until after the setting of the sun, and no person appearing to pay the said rent, and no goods and chattels being thereon whereof distress could be made to satisfy and pay the aforesaid rents, or either of them, the said Stephen Cooke re-entered on the said lot of ground, declaring that he did so in consequence of the said rent not being paid, and there being no goods and chattels on said lot whereof distress could be made, by virtue of the clause of re-entry contained in the aforesaid deed from the said Stephen Cooke to the said Edward Ramsay.

The jury did not find that a demand was made of the rents

aforesaid at any time before the said 31st day of January, 1798; nor that Nicholas Voss, the defendant, to whom Ramsay had conveyed the premises, had notice of the aforesaid demand of rent and re-entry previous to the 6th day of May, 1798.

The jury found that in the summer of 1798, there was a kiln of bricks on the said lot of ground to the value of three hundred dollars, the property of the said Nicholas Voss, who during the said summer erected buildings on the lot to the value of six hundred dollars.

They also found the lease, entry, and ouster.

Mr. Jones and *Mr. E. J. Lee*, for the defendant.

This is a case of forfeiture, and therefore the plaintiff must entitle himself strictly. The jury, although they find that Alexander was seized, yet do not say of what estate.

The re-entry of Doctor Cooke was not lawful. He could not re-enter for the rent due 1st January, 1797, because it does not appear that there were not goods enough on the premises within the first thirty days after the rent became due to satisfy it. It was too late to demand the rent of 1797 in January, 1798, for the purpose of creating a forfeiture. It ought to have been demanded in January, 1797. For the rent of 1798, the re-entry on the 31st of January was too soon. The rent was payable on the 1st of January. The tenant had the whole day to pay it in. On the 31st of January, the thirty days after the rent became payable had not elapsed. The thirty days ended with the 31st of January. The demand might be made on the thirtieth day after, &c., but the re-entry could not be until after the thirty days had completely expired.

The demand of the rent ought to have been made on the 1st day of January, and continued until the thirty days had expired. 4 Bac. Ab. 353. For if a sufficient distress could have been made on any one of the thirty days no re-entry could be made.

The jury have not found the manner of the re-entry nor the mode of demand. The verdict does not state whether there was a mansion-house on the lot, nor that the demand was made on the most public part of the lot.

The demand ought to be made at the front door of the house; if there was no house it ought to be made at the most notorious part of the land. 4 Bac. Ab. 358; 1 Cro. 15. The landlord must enter the house to demand the rent, if the door be open; if there be no house, then it must be demanded at the most notorious part of the land.

They cited *Espinasse*, 177, that courts lean against forfeitures.

Mr. Swann, for the plaintiff.

Twenty years' possession is sufficient to support an ejectment,

Dunlop v. Silver.

whether the seizin be in fee or otherwise; unless the verdict had stated it to be under a lease. The verdict does not say that the re-entry was made on the 31st, but says the demand was a quarter of an hour before sunset on the 31st, and that Dr. Cooke remained on the land until after sunset, and that afterwards he re-entered. *Oates v. Wigfall*, 3 Burr. 1897. It is of no consequence on what part of a lot of 40 feet by 123 the demand is made. There is no part of it on which a man may not be seen from every other part. Har. Co. Lit. 202, (a), note 3.

Judgment for the plaintiff.

JOHN DUNLOP v. WILLIAM SILVER *et al.*

In Virginia the indorsee of a promissory note may recover at law against a remote indorser; and it is not necessary that he should have given the defendant notice of the non-payment by the maker, nor of his insolvency. If the holder receive an inland bill for the money due by the note, it is a discharge of the note unless the parties otherwise agree.

Comparison of handwriting is admissible evidence in civil cases.

ASSUMPSIT by an indorsee against a remote indorser of a promissory note.

James Cavan made a promissory note by which he promised to pay to Silver *et al.*, or order, sixty days after date, six hundred dollars for value received, negotiable at the Bank of Alexandria. Silver *et al.* indorsed the note to Downing and Dowell in these words: "Pay the contents to Downing and Dowell." Downing and Dowell indorsed "Pay the contents to John Dunlop or order." Dunlop brought suit against Cavan, in due time, as the jury thought, and recovered judgment, and sued out execution, upon which Cavan was taken, and took the oath of an insolvent debtor. It was proved on the trial that Cavan had given Dunlop an order on some person in Philadelphia for the money due on the note, which order was returned protested and delivered back to Cavan. The declaration had two counts,—

1. A special count stating the making and indorsing the note, the suit, judgment, and execution against Cavan, and his insolvency.

2. *Indebitatus assumpsit* for money had and received to the plaintiff's use. The plaintiff offered to prove the handwriting of one of the indorsers, by comparing it with the signature of the bail-bond filed in this case; and contended that as it was a bond taken by a sworn officer and filed in court, it could not be denied.

This evidence was admitted by KILTY, C. J., and MARSHALL, J.,

CRANCH, J., *contrà*, because the bond itself was not proved to be signed by the defendant.

On the trial four points were made on the part of the defendants: — 1. That notice of Cavan's refusal to pay was not given by Dunlop to Silver *et al.* 2. That no notice was given by Dunlop to Silver *et al.* that suit had been brought against Cavan and that he had taken the oath of an insolvent debtor. 3. That an action at law will not lie by an indorsee against a remote indorser. 4. That the debt due by the note was discharged by Dunlop's taking an order on Philadelphia.

As to the 1st and 2d points the Court was of opinion (under the authority of the case of *Lee v. Love*, 1 Call, 397, and in conformity to what was understood to be the practice of Virginia,) that notice was not necessary. That the liability of the indorser did not arise until the maker had been sued and proved to be insolvent upon the execution. That notice is of no use to the indorser, for he cannot be called upon until the maker's insolvency is proved; and that the maker's simple refusal to pay was an immaterial fact.

As to the 3d point it was agreed that the verdict of the jury, if for the plaintiff, should be subject to the opinion of the Court upon the question whether an indorsee can maintain an action against a remote indorser of a promissory note payable to order.

Upon the 4th point the Court directed the jury that if they should be of opinion from the evidence that a draft on Philadelphia was received by Dunlop for the money due by the note, it should be considered as a discharge of the note, at least as to the indorsers, unless it should appear to the jury from the whole evidence in the case that there was an agreement of the parties at the time that it should not be a discharge, or only a discharge if paid.

A verdict was found for the plaintiff, and upon argument on the point reserved, it was contended by

Mr. Jones, on behalf of the defendants,

That there was no privity of contract between an indorsee and the remote indorser, that the custom of merchants does not apply to bonds and promissory notes, and perhaps not to inland bills. Kyd, ch. 8, p. 175; *Lambert v. Oaks*, 1 Ld. Raym. 443; *Mackie's Executors v. Davis*, 2 Wash. 219.

Mr. Swann, contrà.

No privity of contract is necessary on either count.

If the paper is negotiable the obligation goes along with it. Even the money due upon a *respondentia* bond has been held to be assignable with the consent of the obligor, and the assignee has recovered in his own name. *Fenner v. Meares*, 2 W. Bl. 1269.

Negro Rose v. Kennedy.

The action for money had and received does not depend upon privity. If a man gets money into his hands to which I am in equity entitled, I may have the action. *Moses v. Macferlan*, 2 Burr. 1012; *Tatlock v. Harris*, 3 T. R. 174; *Grant v. Vaughan*, 3 Burr. 1516; *Ward v. Evans*, 2 Ld. Raym. 930.

KILTY, C. J., and CRANCH, J., were of opinion that the action for money had and received was supported.¹ MARSHALL, J., *contrà*.

Judgment for the plaintiffs. Overruled by the Supreme Court of the United States, in *Mandeville v. Riddle*, 1 Cranch, 290.

LEIPER & Co. v. BICKLEY *et al.*

Notice of the time and place of taking a deposition, given to the attorney-at-law of the opposite party, is sufficient; and one hour's notice, when the party lives in the same village or town, is reasonable notice, unless special circumstances should be shown to render it unreasonable.

On the trial of this cause a deposition *de bene esse* was offered by the plaintiffs.

Mr. Faw, for the defendants, objected,

1. That notice was not given to the other party, but to his attorney at law, and that such notice is not good. Buckner, one of the defendants, was a resident of the town of Alexandria, where the deposition was taken, but was out of town at the time, and his house shut up.

2. That the notice was not reasonable, being only one hour before the time of taking the deposition.

But the COURT was of opinion that the notice to the attorney in such cases is good, and that in this case an hour's notice was sufficient, unless special circumstances should be shown to render it unreasonable.

NEGRO ROSE v. JAMES KENNEDY.

The certificate of a justice of the peace of an oath taken by the owner of a slave may be read to the jury as evidence in itself that the oath required by the statute was taken, although the oath so certified varies from that prescribed.

ACTION of assault and battery to try the plaintiff's right to freedom.

¹ See the grounds of this opinion stated at length in 1 Cranch, Sup. Ct. Reports, Appendix, p. 367.

She was brought into Virginia in the year 1792, and she claimed to be free because her owner had not taken the oath prescribed by the Act of Virginia of 17th December, 1792, section 4, Revised Code, p. 196, (Ed. 1803, p. 187.)

The defendant produced a certificate, by T. Hooe, a justice of the peace, of an oath taken by the owner on the 28th of December, 1792, but varying in some respects from the oath prescribed.

The plaintiff objected to the paper being read to the jury, to prove that the owner took the oath prescribed by law, on account of the variance; and prayed the Court to instruct the jury that the paper, in itself, is not evidence of that fact.

But the COURT refused to give that instruction, and directed it to be read to the jury, and instructed them that they might judge from that, and the testimony produced, whether the oath was taken or not.

CRANCH, J., *contrà*.

The paper is not in itself evidence that the oath, as prescribed, was taken. For when a magistrate undertakes to certify how he has administered an oath, the jury cannot, without proof, presume any thing not certified. They cannot say that he administered the oath in any other form than he has certified.

HERBERT v. WARD.

Goods in the officer's hands under a distress for rent, are liable to attachment at the suit of the same landlord, for the rent not yet due; and may be condemned, although replevied by the tenant after the attachment levied.

ATTACHMENT to secure rents not due, by virtue of the Act of Assembly of Virginia of 29th of November, 1792. Rev. Code, 162, § 8, (Ed. 1803, p. 154.)

On the 27th of March, the plaintiff distrained for more rent than was then due. On the 28th of March, the defendant replevied the goods. On the same day, the plaintiff issued an attachment to secure fifteen months' rent in advance and becoming due from and after the 1st of April. On the 1st of April, the plaintiff distrained for a quarter's rent due that day, and which had been included in the distress made on the 27th of March. On the 17th of April, the attachment for the fifteen months' rent was quashed. On the same day, the plaintiff took out another attachment for three months' rent in advance which was on the same day executed on the goods in the officer's hands under the distress. On the 25th of April, the defendant took out a new replevin for the goods distrained on the 1st of April, which were delivered

Talbot v. Hartley.

to him, and he gave a receipt for them, but the marshal still retained them in his hands under the attachment of the 17th of April. The question was, whether the attachment was properly levied on the goods while they remained in the hands of the officer by virtue of the distress. It was contended that these goods were in *custodiâ legis*, and therefore could not be attached, and of this opinion was CRANCH, J.

But judgment was rendered by KILTY, C. J., and MARSHALL, J., for all the goods attached, including those in the hands of the officer under the distress.

TALBOTT v. HARTLEY.

An award is void which is not final and conclusive, and does not embrace all the matter submitted, and settle the dispute.

After delivering their award, the arbitrators cannot again act upon the case without new authority.

ASSUMPSIT for the labor of two negro boys, Bill and Hanson.

Bowling, the owner of the boys, had by indenture bound them as apprentices to the plaintiff. Bill was to serve until September, 1798, and Hanson until September, 1799.

Talbot hired the boys to Hartley, the defendant, who refused to pay him for their labor, alleging that Bowling claimed it. Upon this, Talbot and Bowling submitted the matter to arbitrators. The submission was in these words: "All our disputes, differences, controversies, &c. concerning two apprentices with said Levi Talbot."

The award was in these words: "We the arbitrators between Robert Bowling and Levi Talbot, do agree that the said negro boy, named Bill, is free from L. Talbot the 13th December, 1797, and likewise the negro boy, named Hanson, is free from Levi Talbot the 31st day of January, 1798.

Signed,

JOSEPH COLEMAN.

ARCHIBALD M'CLISH."

It was proved that this award was signed by both arbitrators, who agreed that the original should remain with Coleman, who should give out copies to the parties; and that Coleman did deliver such copies. Afterwards the arbitrators met again and made a different award.

The COURT decided that the first award was void, because it was not final and conclusive, and did not embrace all the objects submitted. It did not settle the dispute. It did not award a

Negro Sylvia v. Coryell.

release of the covenants, nor a cancelling of the indentures. And that the second award was also void, because the authority of the arbitrators was spent in making the first award.

SUTTON v. MANDEVILLE AND JAMIESON.

A defective forthcoming bond, will, at the plaintiff's request, be quashed, as well as the execution upon which it was founded.

MOTION for judgment on a forthcoming bond.

The bond produced was not signed by Mandeville and Jamieson, but had two scrolls for seals, and was signed and sealed by Charles Turner as surety. Charles Turner was the town serjeant who served the execution upon which the bond was given, and who had returned upon the execution that the bond was returned to the office, but did not describe the bond in any manner. There was no subscribing witness.

The COURT refused to give the judgment; and, at the plaintiff's request, quashed both the bond and the execution.

NEGRO SYLVIA v. GEORGE CORYELL.

If the owner of a slave in Virginia send his slave out of the state for three years, and bring the slave back, it is not such a bringing into the Commonwealth as entitles the slave to freedom, under the second section of the act of 17th December, 1792.

ASSAULT AND BATTERY, to try the right of the plaintiff to her freedom.

Verdict for the plaintiff, subject to the opinion of the Court on the following case:—The plaintiff was born a slave in Virginia, in 1779, and became the property of the defendant, a citizen of Virginia. In June, 1789, the defendant sent her to New Jersey, where she remained three years in the service of the defendant's mother, but continued all that time the property of the defendant. At the end of the three years, the plaintiff returned to Virginia, to the service of the defendant, and has so remained until the time of bringing her action.

Judgment for the defendant, by MARSHALL and CRANCH, Judges. KILTY, C. J., doubted. (See Act of Assembly of Virginia, 17th December, 1792, ed. 1832, p. 186.)

GODDARD v. DAVIS *et al.*

In trespass, the defendant cannot justify under the general issue.

This Court has jurisdiction in trespass, although the damages do not amount to twenty dollars.

TRESPASS for breaking and entering the plaintiff's house.

The COURT refused to permit the defendants, upon the issue of not guilty, to give in evidence testimony to prove that they had a warrant for entering the house.

Verdict for the plaintiff, ten dollars damages.

Motion in arrest of judgment because the damages are less than twenty dollars. Overruled, and judgment for plaintiff.

VOWELL v. ALEXANDER.

In Virginia, debt lies by the indorsee of an inland bill, against the acceptor.

Judgment will not be arrested because the plaintiff's name is indorsed on the bill in blank.

DEBT by indorsee against the acceptor of an inland bill of exchange.

Verdict for the plaintiff, and motion in arrest of judgment, 1st, because an action of debt will not lie; 2d, because it appears, by the plaintiff's indorsement on the bill, that he had parted with his right and interest therein. The plaintiff's name was indorsed in blank, not having been struck out at the trial.

Motion overruled, and judgment entered for plaintiff.

EVE SWOPE v. MARY COURTNEY.

In a joint assault and battery, a recovery in a suit against one is a bar to a suit against the other.

ASSAULT AND BATTERY. The defendant pleads that the assault was a joint assault committed by her and Hannah Dyson, and that the plaintiff recovered judgment at this term against Joseph Dyson, and the said Hannah, his wife, for the same assault. The evidence was, that Mary Courtney and Hannah Dyson were together, and that Dyson threw a bucket of water at the plaintiffs, and dropped the bucket; and that the defendant immediately took up the bucket, and threw it at the plaintiff, for which this action was brought.

 Love v. Fendall's Executors.

On the trial of the case of Dyson and wife, objection was made by the then defendant to the witness giving in evidence the declarations or confessions of the present defendant.

KILTY, C. J., and MARSHALL, J., directed the jury that this was a joint assault and battery, and that the recovery against Dyson and wife was a bar to this action. *Cocke v. Jennor*, Hob. 66; Esp. N. P. 416; *Broome v. Wooton*, Yelv. 67; *Morton's case*, Cro. Eliz. 30; *Parker v. Lawrence*, Hob. 70.

CRANCH, J., *contra*: doubting whether it was a joint assault and battery.

 UNITED STATES v. GEORGE DENEALE.

The register of the Orphans' Court in Alexandria is entitled to the custody of the record books of wills, of the late Court of Hustings.

MANDAMUS NISI, commanding the defendant to deliver to Cleon Moore, register of the Orphans' Court, the records of wills, &c., remaining in the hands of Deneale as late clerk of the Court of Hustings for the town of Alexandria. The return denied the right of Moore to the custody of those papers. The following acts were cited: Supplement to the Act of Congress concerning the District of Columbia, March 3, 1801, § 3 [2 Stat. at Large, 115]; the 6th sec. of the Act of Virginia respecting the District Courts, Dec. 12, 1792, Rev. Co. p. 70; 8th sec. of Act of Virginia, respecting the General Court, Dec. 13, 1792, Rev. Co. 70; 1785, p. 45, concerning Wills, &c.; 1792, § 10, concerning Wills, and 12th sec. of the Act of Congress concerning the District of Columbia, Feb. 27, 1801, [2 Stat. at Large, 103.]

Peremptory madamus ordered.

 LOVE v. FENDALL'S TRUSTEES.

It is not necessary to give notice of the application for an injunction.

BILL for injunction. Objection that no injunction ought to issue until reasonable notice to the opposite party, under the Act of Congress of March 2d, 1793, § 5; Vol. ii. p. 228, Folwell's edition. [1 Stat. at Large, 333.]

Injunction granted, upon bond and security for costs in the amount of \$66.67.

FENDALL v. TURNER.

A motion against a sheriff for not paying over to the plaintiff money made upon a *fi. fa.* may be made in the name of the original plaintiff in the *fi. fa.*, although he had taken the insolvent oath.

The sheriff cannot levy a *fi. fa.* upon money in his hands made upon another *fi. fa.*

THIS was a motion for judgment against Charles Turner, late town sergeant of Alexandria, for not paying over to the plaintiff money made on a *fi. fa.* of *Fendall v. Towers*. The motion was grounded on the Act of Assembly of Virginia respecting executions. Rev. Co. p. 317, § 51. (See this case in the Supreme Court of the United States, 1 Cranch, Rep. 117.)

The cases cited in this Court were, Esp. N. P. 741; *King v. Webb*, 2 Shower, 166; Dalton's Sheriff, 145, 543; *Fulwood's case*, 4 Co. 67; *Rex v. Bird*, 2 Shower, 87; *Hooe's case*, 5 Co. 90; Act of Virginia respecting executions, § 13, 51, 25, 36, and 50; *Armistead v. Philpot*, Doug. 231; *Benson v. Flower*, 4 Cro. 166, 176; *Staple v. Bird*, Barnes's note, 214; *Miller v. Race*, 1 Burr. 457; *Cannon v. Smallwood*, 3 Lev. 203; Godbolt, 147; *Bealy v. Sampson*, 2 Vent. 95.

The COURT decided, 1. That the motion might be sustained in the name of Fendall, although he had taken the insolvent oath; 2. That the sergeant could not levy the execution of *Deneale v. Fendall* on the money in his own hands made on the *fi. fa.* of *Fendall v. Towers*, and that such return was not good.

Judgment for the amount made on the *fi. fa.*, and fifteen per cent. per annum damages.

Affirmed by the Supreme Court of the United States, 1 Cranch, 117.

JOHNSON v. HARRIS.

Bail will not be required to be given by the defendant in an action by his immediate indorsee, while another action is depending against him by a more remote indorsee; especially if the name of the plaintiff has been stricken from the note by the subsequent indorsee.

MOTION for the defendant to appear without bail. Appearance bail had been ruled by one of the judges out of Court upon an affidavit.

The suit was brought upon a note given by Clingman and McGan to Towers, and indorsed by Towers to Harris, by Harris to Johnson, and by Johnson to Dunlop.

 United States v. Burch.

Dunlop had sued Harris, as indorser of this note, in the Court of Hustings of Alexandria. Harris appealed to the District Court at Dumfries, where the judgment was reversed, and Dunlop appealed to the Court of Appeals, where the suit is still pending. At the trial of the cause of *Dunlop v. Harris*, the name of Johnson, the intermediate indorser, was struck out.

The defendant was allowed by KILTY, C. J., and CRANCH, J., to appear without bail. MARSHALL, J., *contrà*.

 RUTTER v. MERCHANT.

This Court has not jurisdiction of an attachment for a sum less than twenty dollars.

ATTACHMENT, on the Act of Assembly of Virginia, issued by a justice of the peace, returnable to the Court of Hustings for £5 10s. Virginia currency.

The COURT decided that this Court has not jurisdiction, the amount demanded being under twenty dollars, upon the principle that it was the intention of the act concerning the District of Columbia that magistrates should have exclusive jurisdiction of all personal demands under twenty dollars, although the words of the act do not give such jurisdiction exclusively. CRANCH, J., *contrà*.

 UNITED STATES v. BURCH.

The day laid in an indictment for selling whiskey is not material. Selling by the wife, with the knowledge and assent of the husband, is the selling of the husband.

INDICTMENT for retailing whiskey without license.

The COURT was of opinion that the day is not material if the fact be proved to be committed before the indictment found. That the selling by the wife, with the knowledge and assent of the husband, is the selling of the husband.

 UNITED STATES v. BURCH.

The time laid in the indictment for keeping a disorderly house is not material. A conviction is a bar to prosecution for all the time previous to the conviction.

INDICTMENT for keeping a disorderly house.

Henry v. Cornelius.

The COURT was of opinion that the time is not material if before the indictment found. The keeping of a disorderly house is a single offence, and one conviction is a bar to a prosecution for keeping a disorderly house at any time prior to the finding of the indictment.

HENRY v. CORNELIUS & WIFE.

Bail cannot be required of a *feme covert* in a civil action.

ACTION on the case.

The COURT decided that a *feme covert* could not be held to bail in a civil action.

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER TERM, 1801, AT ALEXANDRIA.

OLIVE, COLCOTT, & Co. v. MANDEVILLE.

A motion, made before the appearance day, to appear without bail, will not be heard if the defendant be not in actual custody.

THE writ was returnable to this term. The appearance day of this term is the day after the rising of the Court.

Motion by *Mr. Jones* to appear for the defendant without bail, grounded on the defendant's discharge under the bankrupt law of England.

The plaintiff's counsel, *Mr. R. J. Taylor*, made affidavit that the defendant's motion was made the last evening; that he is informed and believes that John Sutton will prove that the discharge was obtained by fraud; that he has called twice at the house of Sutton, and was informed that he was so ill that he could not be seen; and thereupon moved that the defendant's motion might be continued till next term. The defendant had given appearance-bail.

The COURT would not now, in this case, the defendant not being in actual custody, hear the motion to appear without bail before the appearance day.

CAMILLOZ v. JOHNS.

An attachment, issued upon a return of *non est*, before the appearance day, will be quashed.

MOTION to quash an attachment. The plaintiff had taken out a *capias*, returnable to this term,—the return day of this term being the day after the rising of the Court. The writ had been returned during the sitting of the Court, *non est*, and the present attachment issued.

The COURT ordered the attachment to be quashed, it having issued too soon.

Ex parte BOWLING.

A Constable suspended from office before rule to show cause.

ON an affidavit stating that Joseph Bowling, a constable, had dismissed a peace warrant, and had received for his services \$1.62—The COURT suspended him from office, and ordered a rule to be laid on him to show cause why an attachment of contempt should not issue. CRANCH, J., *contra*, because the charge was uncertain and *ex parte*,—no notice having been given.

GADSBY v. MILLER, Special Bail of Colquhoun.

If a Defendant appear to a *sci. fa.* it is not material by whom the writ was served. It is no plea for bail to say that the principal was in jail in Maryland at the time of the judgment against him and has remained in jail ever since. Bail is not discharged by a discontinuance of the suit at the rules, if it be reinstated.

SCIRE FACIAS.

1st Plea. That Miller resides in Caroline county, in Virginia, and was served with the *scire facias* by the sheriff of Caroline county. To this plea there was a special demurrer.

2d Plea. That Colquhoun was in jail in Baltimore at the time of the original judgment, and has remained so ever since.

3d Plea. That the original writ against Colquhoun was discontinued by the plaintiff at the rules in October, and reinstated, at the motion of the plaintiff, at the next rules in November.

4th Plea was the same in substance as the 3d.

To these three last pleas there was a general demurrer.

Mr. Faw and *Mr. Swann* for the plaintiff; *Mr. Simms* and *Mr. Jones* for the defendant.

On the part of the plaintiff, it was said, as to the first plea, that such a service of a *scire facias* is good by the laws of Virginia. Rev. Code, p. 95, § 30. And, at all events, it is cured by the appearance of the defendant.

The second plea was abandoned by the defendant's counsel. As to the third and fourth pleas, the defendant in a *scire facias*, cannot plead that which the original defendant might have pleaded to the original action. *Wraight v. Kitchingman*, 1 Str. 197.

For the defendant, it was said, as to the first plea, that if the defendant comes and pleads the want of proper process, he shall not be prevented by his having appeared. 1 Bac. Ab.

As to the third plea. If the plaintiff does any act by which the bail loses the right of taking the principal in order to surrender

Stieber v. Hoyer.

him, the bail is discharged. In this case the original action was discontinued one month, and during that time the bail would not have been justified in seizing the principal. It gave him an opportunity to escape.

Judgment for the plaintiff.

BUTTS v. SHREVE, LAWRASON, & SLACUM.

It is no cause for arresting judgment, that the jury have found the damages in pounds, when the damages in the declaration are laid in dollars.

THE defendants Shreve and Lawrason pleaded jointly *non assumpserunt*. Slacum pleaded severally *non assumpsit*, and no property in the vessel for the expenses on which the suit was brought. Issues were joined on all the pleas, and the verdict was, "We of the jury find for the plaintiff, and assess his damages at pounds." The damages in the declaration were laid in dollars. *Sands v. Scullard & Dawby*, Yelv. 109; *Skipwith v. Baird*, 2 Wash. Va. 165; *Hawks v. Crofton*, 2 Burr. 698; *Jennings v. Lee*, Style, 150, 198, 210; *Burton v. Chapman*, 1 Sid. 341.

Judgment for the plaintiff.

McKNIGHT v. RAMSAY.

In an action of debt for an amount large enough to support the jurisdiction of this Court, it is no cause for arrest of judgment that the sum due is reduced by offsets to a sum for which the Court would not have had original jurisdiction.

DEBT. Verdict for the debt in the declaration mentioned to be discharged on payment of 3*l.* 11*s.* — the plaintiff's demand being reduced to that sum by offsets.

Motion by *Mr. Taylor*, for the defendant, for nonsuit; the sum being less than twenty dollars, and so not within the jurisdiction of this Court.

Mr. Swann, for the plaintiff, cited *Gross v. Fisher*, 3 Wilson, 49. Nonsuit refused.

STIEBER v. HOYE.

A *fieri facias*, received by the marshal before an attachment for rent not due, is entitled to priority, and must be first satisfied.

On an attachment to secure rent not due, under the Act of

M'Call v. Towers.

Assembly of Virginia, Rev. Code, p. 162, § 8, the marshal returned that he had attached the goods and chattels of the lessee, and also at the same time levied a *fi. fa.* on the same at the suit of Shuck against the said lessee, which *fi. fa.* was received by the marshal before the attachment was issued. No rent was due at the time of the receipt of the execution.

The Court decided that the execution should have priority, and hold the goods against the attachment.

McINTOSH v. SUMMERS.

Oral evidence of an agreement that the defendant should retain certain notes as security against other notes, may be given although there be a written agreement to return them on demand.

TROVER for sundry notes. Evidence was given of a demand and refusal, the defendant stating that he held them as counter security to indemnify him against his indorsement of a note held by Tafts and Brooks. Evidence on the part of the defendant was produced of conversations between the plaintiff and defendant in which it was agreed, or understood that the latter was to retain the notes for that purpose.

The Court instructed the jury that if they should be of opinion that McIntosh had agreed that the papers should be left with Summers for that purpose, then he had a lien on them: and that in such case his refusal was no evidence of a conversion.

Mr. Lee, for the plaintiff, moved the Court to instruct the jury that an oral agreement to leave the notes in his possession could not control the written agreement to return them on demand. Which instruction the Court refused to give; and a bill of exceptions was taken, but the case was never carried to the Supreme Court, the verdict being for the plaintiff.

M'CALL v. TOWERS.

The affidavit of service of a notice by leaving it with the defendant's wife, need not state that the wife was informed of the purport of the notice.

THE notice to take a deposition was delivered to the defendant's wife, at his dwelling-house.

It was objected that the affidavit of service did not state that the wife was informed of the purport of the notice.

Sheehee v. Resler.

The COURT adjudged the notice to be good. Laws of Virginia, Rev. Code, 230, c. 141.

LANSTRAAZ v. POWERS.

In slander, bail is not required, if the affidavit does not state the words spoken, and that the defendant is about to leave the district.

SLANDER. The affidavit to hold to bail, stated that by reason of slanderous words, (without stating what words,) spoken of the plaintiff as a miller, he conceived himself greatly injured, and that he had been informed the defendant was about to leave the District of Columbia. The Chief Judge had indorsed appearance bail for fifty dollars.

The COURT allowed the defendant to appear on common bail.

SHEEHÉE v. RESLER.

In an action on the case for a malicious prosecution, the defendant may, upon the general issue, show probable cause for the prosecution.

CASE, for a malicious prosecution. To set aside an office judgment at the third term after it was rendered, the defendant pleaded a special justification which went to show probable cause for the prosecution.

The counsel for the plaintiff objected to the receiving the plea, and cited, Buller, N. P. 14; *Sutton v. Johnstone*, 1 T. R. 493; *Coxe v. Wirrall*, Cro. Jac. 193; *Downman v. Downman*, 1 Wash. 29; *Farmer v. Darling*, 4 Burr. 1971.

CRANCH, J. As the gist of the action is malice and the want of probable cause, the plaintiff must show the want of such cause; which will admit the defendant to give in evidence on the general issue the same facts which he has pleaded specially. Consequently, it is not necessary to the merits of the case that they should be specially pleaded. And the defendant having suffered an office judgment to go against him, and this not being a plea to issue, he cannot claim it as a matter of right.

MARSHALL, J. of the same opinion.

KILTY, C. J. Although it is necessary for the plaintiff to give evidence of a want of probable cause, yet that would perhaps only admit the defendant to give evidence as to the same facts which were disclosed by the plaintiff, and might not authorize him

Smith v. M'Cleod & Braden.

to give evidence of other facts within his own knowledge, and which might not be known to the plaintiff. This is a plea tending to an issue, and I think the defendant is in time to plead it.

A bill of exceptions was taken. See this case in the Supreme Court of the United States, 1 Cra. Rep. 110, where the judgment was affirmed.

SMITH v. M'CLEOD & BRADEN.

In a court of a limited jurisdiction a plea, that the cause of action did not arise within the jurisdiction of the court, is a plea in bar, and good after office judgment.

DEBT, in the Court of Hustings. Plea to the jurisdiction that the cause of action did not arise within the town of Alexandria.

Plaintiff demurred generally, and contended that the plea was not a proper plea after an office judgment.

Mr. Faw, for the defendant, cited *Downman v. Downman's Ex'ors*, 1 Wash. Rep. 28; *Chumley v. Broom*, Carthew, 402; 1 Bac. Ab. 35. This is a plea in bar and not in abatement; it is not a dilatory plea — not necessary to be sworn. The plaintiff's remedy is not by demurrer. He ought to have objected to receiving the plea at the time the office judgment was set aside. The plea is good both in form and substance. Several terms have passed since it was filed. The Court cannot now go back and say the plea ought not to have been received. They cannot correct their own errors after the term. But this plea was received in the Court of Hustings, before the existence of this Court. *Gordon v. Frazier et al.* 2 Wash. 135.

Mr. Swann, contra, contended it was a dilatory plea, and if put in at an improper time, the plaintiff might demur, and cited *Impey*, 294; *Barnes*, 264.

Judgment for defendant, on the demurrer *quod breve cassetur*.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1801, AT WASHINGTON.

CALVERT v. SLATER.

If the defendant on the plea-day demand oyer which is not given until the subsequent term, the Court will give the defendant time to plead after oyer.

DEBT on bond. A rule to plead had been laid on the defendant at last term. On the plea-day the defendant prayed oyer of the bond, which being now given, the Court enlarged the rule until Monday next.

Mr. Simms, for plaintiff. *Mr. Gantt*, for defendant.

UNITED STATES v. PAXTON.

A servant selling spirituous liquors for his master without license is not liable to the penalty.

INDICTMENT for retailing spirituous liquors without license.

The COURT directed the jury that if they should be of opinion that the defendant sold the liquor as clerk, agent, servant, or bar-keeper of Brown, then he was not guilty. It was the selling of Brown within the meaning of the act. See also *post*, *United States v. Shuck*, Alexandria, January term, 1802, (p. 56,) and *United States v. Voss*.

UNITED STATES v. NEGRO JACK, a Slave.

This Court has not jurisdiction of larceny by a slave.

INDICTMENT for theft. Plea to the jurisdiction, it being a case cognizable only by a justice of the peace, by the Act of Assembly of Maryland.

The COURT decided that they had not jurisdiction, and ordered the slave to be delivered to a constable to be carried before a justice of the peace.

Thompson v. Berry.

UNITED STATES v. DINAH MADDEN *alias* HOPEWELL.

The Court may order an indictment to be sent to the grand jury without a previous presentment for the same offence.

INDICTMENT for stealing. Verdict for the prisoner. The testimony appearing to justify an indictment for receiving stolen goods, the COURT ordered such an indictment to be sent to the grand jury.

KILTY, C. J., *contra*, was of opinion that there ought to be a previous presentment by the grand jury upon which to found the indictment. The prisoner was remanded.

CULL v. ALLEN.

Oyer of the record of a judgment of another State will not be given if not prayed before the expiration of the rule to plead.

DEBT on a judgment of a court in Vermont. A rule to plead was laid at June term, 1801.

The Court at September term was wholly occupied in the trial of the cause of *Forrest v. Hanson*.

The defendant now prays oyer of the judgment and record of the recovery. And the plaintiff moves for judgment on the rule to plead.

The COURT refused to compel the plaintiff to give oyer of the record; permitted the defendant to plead by ten o'clock the next day; and continued the cause.

THOMPSON v. BERRY.

A man cannot lawfully push another off from his land without first requesting him to go off.

ASSAULT and battery. Plea, *molliter manus imposuit*.

Mr. Hewitt, for the defendant, prayed the Court to instruct the jury that if they should be of opinion, from the evidence, that the defendant had legal possession of the place where, &c., he had a right to remove the plaintiff by pushing him off.

The COURT refused to give the instruction as prayed; being of opinion that a previous request to the plaintiff to go off was necessary.

KILTY, C. J., absent.

CIRCUIT COURT OF THE UNITED STATES.

JANUARY TERM, 1802, AT ALEXANDRIA.

ATKINSON v. PATTON.

It is no justification, in slander, that the defendant received his information from his slave.

SLANDER. Office judgment at the rules before last term.

Mr. Taylor, for the defendant, moved to set aside the office judgment on filing special pleas of justification to the first and third counts, and a demurrer to second count. The special justification was, that, at the time the defendant spoke the words, he stated that he had received his information from his slave.

Mr. Lee, for the defendant, cited the following cases in support of the plea. *Davis v. Lewis*, 7 T. R. 17; *Earl of Northampton's Case*, 12 Co. 132; and *Actions of Slander*, 4 Co. 12.

Mr. Swann and *Mr. Young*, for the plaintiff, said that the reason of those decisions was that the plaintiff might have his action against the person from whom the defendant received his information. But in the present case the defendant's informer is a slave, against whom no action lies.

The COURT seemed inclined to the opinion that the special matter, if good, might be given in evidence on the general issue.

Cur. ad. vult. Afterwards the Court was unanimously of opinion that the pleas ought not now to be received. KILTY, C. J., because the facts stated are not a justification; MARSHALL, J., because the pleas did not confess the words charged.

COMMONWEALTH OF VIRGINIA v. S. SMITH.

The day of selling spirituous liquors is immaterial if proved to be within twelve months before filing the information. All the acts of selling before the filing of the information are parts of the same general offence of selling without license.

INFORMATION for selling spirituous liquors without license on the 10th August, 1798.

Commonwealth of Virginia v. Zimmerman.

On the motion of *Mr. Mason*, Attorney for the United States, the COURT instructed the jury that the day is immaterial if proved to be within twelve months before filing the information; being of opinion that every act of selling before the filing of the information is part of the same general offence of selling.

Special verdict. *Venire facias de novo* awarded.

COMMONWEALTH OF VIRGINIA v. JOHN SMITH.

The By-laws of 1784 apply to the subsequent addition made to the town of Alexandria by the Act of 1797.

INFORMATION for keeping a slaughter-house within the limits of the town of Alexandria, contrary to a by-law of the corporation passed in 1784. The place where the slaughter-house was kept was not within the limits of the town at the time of passing the by-law, but was added to the town by an Act of Assembly of Virginia in 1797.

Mr. Mason, for the Commonwealth, contended that when a new part is added to a town it becomes subject to all the existing laws of that town. The Act of Assembly of 1797 is express that such new part should be subject to the same regulations as the old.

Mr. Simms, for the defendant. A penal law must be construed strictly. In the by-law of 1784, the word *limits* refers to the then existing limits, and the effect is the same as if it had said that no person should keep a slaughter-house between the Potomac and St. Asaph Street, which was then the boundary of the town. If Maryland should be added to Virginia, the penal laws of Virginia would not apply to Maryland.

Mr. Jones, on the same side. If a country, by cession or conquest, becomes annexed to another, it remains subject to its old laws until altered by its new sovereign.

Mr. Mason, in reply, was stopped by the COURT, who instructed the jury that the by-law of 1784 was in force in the addition to the town, and applied as much to that as to the original limits.

Special verdict. *Venire facias de novo* awarded.

COMMONWEALTH OF VIRGINIA v. ZIMMERMAN.

In a criminal prosecution, the Court will not permit counsel to argue a point of law to the jury which has been decided by the Court.

If the jury, after having retired to consider of their verdict, return into court to re-examine a witness, neither party will be permitted to ask any question of the witness, nor to make any motion to the Court in the presence of the jury.

INFORMATION for keeping a slaughter-house within the limits of the town of Alexandria, contrary to the by-law of 1784.

In the trial of John Smith, yesterday, for the like offence, the COURT decided that this by-law was in force in the addition to the town made by the act of 1797.

Mr. Jones, for the defendant, after informing the jury that they were constitutional judges of the law as well as of the fact in criminal cases, was proceeding to argue the same point of law before the jury, when

The COURT stopped him, and said that the Court having decided that point of law, he must not argue it before the jury. See *United States v. Cottom*, (post, p. 55.)

CRANCH, J., *contra*, observed that he held it to be an important point in favor of the liberties of the people that the jury, in criminal cases, had a right to decide the law as well as the facts. And if they were to decide the law, it seemed to follow that they had a right to hear the arguments of counsel upon the law; especially as the opinion of the Court was not given in this, but in another case, before a different jury.

The jury having retired, asked leave to come again into Court and re-examine the witnessess, which the Court permitted them to do; but informed the bar that in such cases neither party has a right to ask questions or to make any motion to the Court in the presence of the jury.

COMMONWEALTH OF VIRGINIA v. ROBERT GORDON.

The indorsement of the name of the witness by the grand jury on the presentment, is *prima facie* evidence that it was made upon his testimony.

INFORMATION for retailing liquors, &c.

The witness, Michael Stieber, testified that he bought liquor of the defendant about three weeks before he gave evidence to the grand jury who found the presentment upon which this information was filed; and that he never gave evidence before them against the defendant but once.

Mr. Mason, for the United States, offered to prove the time of his being sworn to the grand jury by the record of the presentment, which states it to be made on the information of Michael Stieber, the present witness.

On considering the Act of 1795 making it a part of the duty of the grand jury to indorse on the presentment the name of the person on whose information it was found, the COURT permitted the record to go in evidence to the jury to prove the time when the witness testified to the grand jury.

MARSHALL, J., doubting.

UNITED STATES v. MICHAEL CARRIGO.

Peremptory challenge allowed only in capital cases, in Alexandria.

The United States cannot give evidence of the general bad character of the prisoner, unless the prisoner should first bring evidence to support his character.

INDICTMENT, under the Act of Congress of 1790, [1 Stat. at Large, 112,] for stealing.

Mr. Edward J. Lee, for the prisoner, contended that he had a right to a peremptory challenge. He contended that the prisoner was charged with felony; and by the law of Virginia, Rev. Code, 110, "no person charged with murder or felony shall be admitted to a peremptory challenge of more than twenty," which implies the right peremptorily to challenge that number. A felony is such an offence as by the common law worked a forfeiture of goods or chattels, or both. If a statute changes the punishment and takes away the forfeiture, the offence does not thereby cease to be a felony.

Mr. Mason, for the United States, cited 2 Hawk. p. 580, 581.

The COURT decided that in cases not capital the prisoner has not a right to the peremptory challenge.

The Court refused to permit the attorney for the United States to bring evidence of the general bad character of the prisoner, unless the prisoner should first bring evidence in support of his general character.

MCGILL v. SHEEHY.

The plaintiff, in slander, may have leave to withdraw his general replication and file a general demurrer, and the Court will give the defendant leave to change his plea.

SLANDER. Leave was given to the plaintiff to withdraw his general replication to the defendant's special justification, and file a general demurrer. The defendant had also leave to withdraw his plea, and offer another plea by Tuesday next.

PICKETT'S EXECUTORS v. LYLE.

After plea by appearance-bail the defendant may give special bail and plead a new plea.

THE appearance-bail had appeared and pleaded for the principal.

Mr. Swann, for the defendant, now offered special bail, and

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United States v. Heinegan.

moved for leave for the defendant to appear and plead the general issue, and withdraw the plea filed by the appearance-bail. Granted.

Mr. Love, for the plaintiff.

JUAN ANTONIO REVEREZ v. JUAN CAMELLOS.

Security for costs may be given at any time before judgment on the rule.

Mr. Jones, for defendant, moved for a nonsuit on a rule to give security for costs laid at the November rules.

While *Mr. Jones* was making his motion, *Mr. Lee* offered himself as security.

Mr. Jones contended it was too late, the sixty days having elapsed; but the COURT permitted the security to be given.

WHITE v. PERRIN.

Judgment will not be rendered on motion of one surety against another, unless the insolvency of the principal be fully proved.

MOTION by White, under the Act of Assembly, Rev. Code, 292, for judgment against Perrin as a co-surety for Miller; Kennedy, the creditor, having recovered judgment for the whole debt against White.

Refused, because the insolvency of Miller was not fully proved.

UNITED STATES v. HEINEGAN.

This Court has jurisdiction of prosecutions for gaming under the law of Virginia, although that law directs the prosecution to be had before a justice of the peace.

An offence against the Commonwealth of Virginia, committed in Alexandria before the first Monday of December, 1800, may be prosecuted in this Court as an offence against the United States.

When the penalty is fixed by law, the fine is not to be assessed by the jury.

INDICTMENT for gaming contrary to the Act of Virginia, Rev. Code, p. 184, § 5. Motion to quash the indictment, because the statute points out the mode of prosecution, namely, by conviction before a justice of the peace.

For the traverser it was contended that where another mode of recovering the penalty is provided than by indictment, there indictment cannot be supported; nor can an indictment be main-

tained unless there be a prohibitory clause. 2 Hale, 171; *Rex v. Robinson*, 2 Burr. 803; and *Rex v. Royall*, 2 Burr. 32.

The Act of Assembly says, "that if any person shall play, &c., every such person, upon conviction thereof before any justice of peace in any county in this Commonwealth, by the oath of one or more credible witness or witnesses, &c., shall forfeit and pay twenty dollars, to be levied by distress and sale of the offender's goods, by warrant under the hand of the justice before whom such conviction shall be, and for the use of the poor of the parish wherein such offence shall be committed. And, moreover, every person so convicted shall be committed to the county jail, there to remain until he give sufficient security for his good behavior for twelve months."

The 5th section of the Act concerning Jurors, Rev. Code, 107, does not extend to the District Courts, nor does it necessarily imply that indictment is in all cases a proper mode of recovering a penalty. A presentment is a mere informal accusation. It only denounces the fact in order that it may be punished in legal form.

The transfer of jurisdiction has not altered the laws of Virginia in this part of the district. But by the first section of the Act concerning the District of Columbia, 27th February, 1801, [2 Stat. at Large, 103,] those laws are expressly declared to remain in force. And although, by the 5th section, this Court has cognizance of *all* offences, yet, by the 11th section, the justices of the peace here are to have the same cognizance as justices of the peace in Virginia.

By the letter of the Act of Assembly the penalty does not accrue until a conviction before a justice of the peace has taken place. By the third section of the supplemental Act of Congress of 3d March, 1801, [2 Stat. at Large, 115,] this Court is to exercise the same power and jurisdiction as the District Courts of Virginia. But those courts have no jurisdiction of this offence. The 2d section of that act did not mean to limit the mode of prosecution, but to alter the style.

Besides, the fact is stated in the indictment to have been committed before the 3d of March, 1801, and therefore the act of that date cannot alter the mode of prosecution then existing. The penalty was to accrue to the poor of the parish, and upon the commission of the offence the right to the penalty vested in the parish. The subsequent Act of Congress could not take away this vested right.

If the remedy by indictment is cumulative, it ought not to be countenanced by the Court. 2 Hawk. 301, c. 25, § 4; 7 Co. 36, (a); *Castle's Case*, Cro. Jac. 643, 644.

Mr. Mason, contra.

The powers of this Court are not limited by those of the District Courts of Virginia. The words of the 5th section of the Act of Congress concerning the District of Columbia are peremptory. This Court shall have cognizance of all offences, &c. But the District Courts of Virginia had cognizance of this offence by the Act of 1797, c. 2. No penalty can be recovered but by indictment, presentment, or action of debt. Act of Congress of 3d March, 1801, § 2, [2 Stat. at Large, 115.] The case cited from 2 Burrow, only shows that the remedy by indictment is not the best mode.

By the Constitution of the United States the trial of all criminal cases must be by jury. If the Act of Virginia giving cognizance to a justice of peace is repugnant to the Constitution, the latter must prevail. The Act of 3d of March is not *ex post facto*, it only directs the mode of prosecution.

The Court refused to quash the indictment, relying on the 2d section of the Act of 3d of March, 1801. The jury found a verdict against the traverser, stating the fact to have been committed before the first Monday in December, 1800, the day appointed by the Act of Congress of 1790 for the removal of the seat of government of the United States to the District of Columbia.

Mr. Mason moved for judgment on the verdict, and contended that there never had been a time when the laws of Virginia were not in force in this part of the district.

Mr. Swann, for the traverser, contended that this was an offence against the Commonwealth of Virginia, and not against the United States, and that the penalty accrued to the Commonwealth, who might maintain an action of debt for it.

KILTY, C. J. The question to be determined, is, whether on the motion of the Attorney for the United States, judgment shall be given on the verdict of the jury. The effect of the verdict is admitted to be, that the offence was committed before the 1st Monday of December, 1800, and within one year from the presentment, so that the question will turn upon the jurisdiction of this Court, as to an offence committed within the corporation of Alexandria before the said 1st Monday of December, 1800. I think it necessary to recur to the origin of the jurisdiction of the United States within this district.

By the 8th section of the 1st article of the Constitution, Congress are empowered "to exercise exclusive legislation in all cases whatsoever over such district, (not exceeding ten miles square,) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States."

In December, 1789, an act passed in Virginia declaring that a

tract of country as therein described, should be forever ceded and relinquished to the Congress and government of the United States, in full and absolute right and exclusive jurisdiction, pursuant to the 8th section of the 1st article of the Constitution of the United States, with a proviso that the jurisdiction of the laws of Virginia, over individuals residing within the limits of such cession, should not cease or determine until Congress, having accepted the cession, should by law provide for the government thereof.

The Congress, by an act passed in 1790, [1 Stat. at Large, 130,] did accept the cession of Virginia and Maryland, of a district as therein described, which was altered by an act passed in 1791, [1 Stat. at Large, 214,] so as to include Alexandria, and in the act of 1790, it was provided that the operation of the laws of the State within such district, should not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress should otherwise by law provide. The particular place for the seat of government, was afterwards established by the President's proclamation dated the 30th of March, 1791. I lay it down as a consequence flowing from these several public acts, that from the date of the proclamation, all the laws of Virginia then in existence, or thereafter to be made respecting persons and property, within the cession, were made subject to the future controlling power of Congress, in such manner as they might exercise it after the 1st Monday in December, 1800; and that the security of persons and rights, and the punishment of offences within the said district, were liable to the said jurisdiction of Congress under any laws to be constitutionally made.

In this situation of the inhabitants of this district, there never was any period of time at which the law had not operation to punish offences, or at which breaches of the laws committed, but not prosecuted, or commenced to be prosecuted, would cease to be offences, or cease to be punishable. It appears to me that when the operation of the laws was reserved in the acts of cession and acceptance, the reservation included a power in the State Courts to put those laws in execution, and therefore I have formed the opinion that the power of those courts remained complete until the 27th of February, 1801, when the act respecting the District of Columbia passed, establishing this Court and thereby providing otherwise by law. Under the act of 1790, the Congress had no power to affect the operation of the laws of Virginia until the 1st Monday of December, 1800. They then had the power, but the operation of those laws was not affected till Congress provided otherwise by law. It must have occurred to the framers of those laws, that no point of time could be fixed on for the change

of jurisdiction, when all offences would be acted upon and tried, and when there should be no offences remaining committed and not tried.

The Courts of Virginia, while they possessed the power of trying offences, might have exercised it as expeditiously as their laws would admit, so as to leave few cases undecided. But when the jurisdiction of the United States Courts commenced, that of the Virginia Courts ceased; for by the words "the operation of the laws shall not be affected until the time fixed for the removal, and until Congress shall otherwise by law provide," we must understand that when these events happened, the operation was affected. The question arises, then, as to the manner of punishing offences committed before the removal, or the assumption, and not acted upon in any manner by the Virginia Courts. I cannot admit the supposition that such offences were to remain unpunished. To suppose that they were to be punished by the Courts of Virginia out of the District, would be to defeat the purposes for which the jurisdiction was taken, and would tend to prevent the exercise of it.

The 14th section of the act concerning the District, provides for the continuing over to this Court all actions, process, &c. depending in the Hustings Court; but the omission of an express provision does not prevent the exercise of a power which necessarily flows from the nature of the jurisdiction. I therefore consider that all offences which were committed and not tried, or in which the trial or prosecution had not commenced, are cognizable by this Court. The Congress, in providing by law for the regulation of the District, had a right to take the State laws in whole or in part. They have said that the laws of Virginia should be in force here, and they have declared that all fines accruing under these laws should be recovered in the name of the United States in this Court. I give the word *accruing* a very unlimited sense, and consider that the moment an offence is committed, a right accrues in the government by its courts to prosecute for the penalty provided by a prior law, and that all penalties which had not been exacted, were, by the change of jurisdiction, accruing to the United States.

MARSHALL, J., assented to the judgment, upon the grounds that the jurisdiction of the Court of Hustings, (it being but an exercise of the corporate power of the town of Alexandria,) continued notwithstanding the transfer of the jurisdiction from Virginia to the United States.

After the opinion of the Court was given, *Mr. Jones* moved in arrest of judgment, and assigned general errors only; and requested that his motion might be continued for argument till

United States v. Cottom.

next term. But the COURT refused the continuance, and ordered the motion to be argued at this term — upon which *Mr. Jones* withdrew his motion. He then objected to the rendition of judgment for the penalty of \$20, because the jury ought to have assessed the fine under the law of Virginia, p. 112. But the penalty being certain, and not discretionary, the Court ordered the judgment to be entered.

UNITED STATES v. GADSBY.

An indictment will not lie under the Virginia act, for suffering gaming in the defendant's house; because the act has given an action of debt to the informer.

INDICTMENT for suffering gaming in his public inn, contrary to the Act of Virginia, January 19, 1798, c. 2, § 3.

This indictment was quashed, upon the same ground upon which the Court instructed the jury in the case of *United States v. Simms*, yesterday. See that case in the Supreme Court of the United States, in 1 Cranch, Rep. 252.

UNITED STATES v. EVANS.

An information may be amended.

THE information was amended by filling up the blank of the date of the commission of the offence. The same amendment was also permitted in the cases of *United States v. Howard*, *United States v. Smith*, and *United States v. Zimmerman*.

Leave was given to the defendants to plead *de novo*; and a continuance allowed at their request.

The COURT, also, in this case, gave leave to amend the information, by describing the particular kind of liquor sold.

UNITED STATES v. COTTOM.

A *capias* may be issued as the first process against a person for unlawful gaming. The Court will not suffer counsel in a criminal prosecution to argue to the jury, a point of law which has been decided by the Court.

INDICTMENT for gaming, contrary to the Act of Virginia. A *capias* had issued upon the indictment, as the first process.

Mr. Swann, for the defendant, moved to quash it, as being illegal and oppressive. But the COURT overruled the motion.

United States v. Shuck.

Mr. Taylor began to address the jury on the points of law heretofore decided by the Court, that the offence was not committed within the jurisdiction of the Court, being before the 1st Monday of December, 1800; and that an indictment is not the proper and legal process in such cases.

The COURT stopped him, and said they had before prevented *Mr. Jones* from arguing points of law to the jury, which the Court had decided against him, (see *Commonwealth v. Zimmerman*, ante p. 47,) and they had not altered their opinion on that subject.

Mr. Jones, for defendant, tendered a bill of exceptions.

SMITH v. CATLETT.

The Court will not interfere to prevent the bail from seizing the principal further than to keep order in Court.

Mr. E. J. Lee presented to the Court an affidavit, stating that Smith was bail for Catlett in a suit in the Dumfries District Court. That Smith had this morning arrested Catlett by virtue of a bail-piece in the market place, but that Catlett forced himself into the presence of the Court while sitting. That the marshal refused to suffer Smith to take Catlett by force out of court, and refused to turn Catlett out of court. The motion was to permit Smith to take him in the presence of the Court and carry him away; or that the Court would command him to surrender himself to his bail.

But the COURT refused to interfere and commanded the marshal to see that order was preserved in court.

UNITED STATES v. SHUCK.

An information may be amended.

A servant selling spirituous liquors for his master is not personally liable for the penalty.

INFORMATION for selling spirituous liquors, permitted to be amended, by inserting the date of the offence, and also the words "sold and to be drank at the *circus*, instead of at his own house."

On the trial, the defendant attempted to prove that he acted as servant or agent of another person.

The COURT instructed the jury that if they should be of opinion, from the evidence, that the defendant acted as the servant of another person, and had no part of the profits, it was not to be considered as his selling, but that of his master. See *ante*, *United States v. Paxton*, (p. 44,) and *post*, *United States v. Voss*.

POTTS & RAMSAY v. SKINNER & CADOGAN.

Notice, given to the attorney at law, of a motion for a *dedimus*, is sufficient.

MOTION by the plaintiffs for leave to take a commission to New York to examine a witness.

Mr. Swann, for defendants, objected that the notice of this motion was given to him, who was only attorney at law for the defendants, and not their attorney in fact. The Act of Assembly means attorney in fact. Act of 29th Nov. 1792, § 13, Rev. Co. p. 279.

But the COURT decided the notice to be sufficient, and ordered the *dedimus*.

NEALE v. WALKER.

The defendant cannot avail himself of the statute of limitations upon the general issue.

ASSUMPSIT for goods sold and delivered. Issue *non assumpsit*.

Mr. Simms, for the defendant, contended that under the Act of Virginia, 1793, § 9, Rev. Co. p. 115, every article which appeared in the plaintiff's account to be charged more than one year before the action brought, ought to be rejected by the jury; upon which

Mr. Taylor, for the plaintiff, moved the Court to instruct the jury that they were not to regard the act of limitations, as it was not specially pleaded.

Mr. Simms, for the defendant, contended that this act differs from common acts of limitation in that it was imperative to the jury. The seventh section enacts that all actions or suits founded upon any account for goods, wares, and merchandise, "sold and delivered, or for articles charged in any store account, shall be commenced and sued within one year next after the cause of such action or suit, or the delivery of such goods, &c. and not after." The ninth section declares, that "to prevent any doubt in the construction hereof, it is hereby declared, that the before mentioned limitation of one year, shall take place and be computed from the respective dates or times of delivery of the several articles entered or charged in any such account; and that all such articles as shall have been of more than one year's standing when the action or suit was commenced, shall be disallowed and rejected, and verdict shall be given, or judgment rendered for no more than the amount of such articles as appear to have

United States v. Gordon.

been actually charged or delivered within one year next before the commencement of the suit as aforesaid."

But the COURT decided that the time was not put in issue by the plea of *non assumpsit*; and the jury were only to try the issue joined, and so instructed the jury.

NICHOLLS v. WHITE.

One hour's notice of taking a deposition in Alexandria is sufficient.

It is not a good objection to a deposition taken by *dedimus*, that it is in the handwriting of the counsel of the opposite party.

The affidavit of the party is sufficient to prove to the Court the loss of papers, so as to admit secondary evidence of their contents.

MR. SIMMS, for the plaintiff, objected to the deposition of Thomas White, that the notice given of the time and place of caption was not reasonable. The notice was served between eleven and twelve o'clock, A. M. to attend at Gadsby's tavern between twelve and one o'clock of the same day.

But the COURT decided the notice to be reasonable.

Mr. Simms then objected, that the deposition was in the handwriting of the defendant's counsel, contrary to the Act of Congress, [1 Stat. at Large, 89.]

But the deposition being taken by *dedimus* from this Court, and according to common usage, the COURT unanimously decided that it might be read. The deposition was to prove the contents of certain papers which had been used at a former trial of the same cause.

Mr. Simms objected to the reading of the deposition, until the loss of the papers was proved.

The COURT thought the loss was sufficiently proved by the affidavit of the defendant himself, which was made to procure the new trial.

UNITED STATES v. ROBERT GORDON.

In an information for selling spirituous liquors without license, it is not necessary to specify the kind of liquor, nor the person to whom sold.

All the acts of selling constitute one offence.

INFORMATION for selling spirituous liquors. Motion in arrest of judgment. 1st. Because the particular kind of liquor is not specified in the information. 2d. Because the person is not named to whom sold.

Mr. E. J. Lee, for the defendant. The clause of the Act of Assembly upon which this prosecution is founded, is in the following words. Rev. Co. 212, § 4. "If any person, without such license, shall open a tavern, or sell by retail, wine, beer, cider, rum, or brandy, or other spirituous liquors, or a mixture thereof, to be drank in or at the place where it shall be sold, or in any booth, arbor, or stall, such offences shall be deemed a breach of good behavior, and he or she so offending, shall moreover forfeit and pay the sum of thirty dollars, to be applied towards lessening the county levy." By the fifth section, the offender, upon a second conviction, is to be imprisoned six months without bail or mainprize. Every selling is a distinct offence. If this was not the case, a conviction for the last selling would bar a prosecution for all the former offences. *Rex v. Robe*, 2 Str. 999; *Davy v. Barker*, 4 Burr. 2471; *Rex v. Mason*, 2 T. R. 581, Style, 186.

Mr. Simms, on the same side. The information is not sufficiently certain to enable the defendant to meet the charge by counter evidence, or to plead it in bar of a subsequent prosecution. By the fifth section of the act, a higher penalty is annexed to a second offence, and in such case the indictment must state the prior conviction. A declaration, in trover, as uncertain as this, would be bad — 5 Bac. Ab. 272 — *a fortiori*, an information, or an indictment. The Court is bound, *ex officio*, to see that the information states sufficient to warrant a judgment. *Rex v. Wheatley*, 2 Burr. 1127; 2 Ld. Raym. 1410; 2 Hawk. 332. The offence is alleged to have been committed on the 10th of August, 1798; and the information was not filed until April, 1800, more than twelve months after the offence committed, contrary to the Act of Assembly, Rev. Co. p. 113.

Mr. Mason, contra.

The limitation of one year applies to the prosecution, not to the filing of a particular process. The presentment upon which the information was filed was within the year. The first step was the presentment, and that is the commencement of the prosecution. Rev. Code, 106, section 2. Circumstances which constitute the offence, must be set out. But where they are not of the essence of the offence, there, if set forth, they are only surplusage. *Rex v. Parson Horne*, Cowp. 682. The words of the act are "spirituous liquors or a mixture thereof." It may be impossible for a man to say what kind of liquors constitute the mixture; and yet he may be certain that he is drinking spirituous liquors. *Rex v. Gibbs*, 1 Str. 497. All the acts of selling spirituous liquors before conviction constitute but one offence. *Crepps v. Durden*, Cowp. 640.

Motion overruled and judgment entered.

ALLEN v. GREENWOOD.

Attachment lies against an absconding debtor, under Virginia law, notwithstanding the 6th section of the Act concerning the District of Columbia.

MOTION for judgment on attachment from a justice of the peace, under the Act of Virginia, 26 Dec. 1792, pp. 116, 117.

The affidavit stated that Greenwood, late of the county of Alexandria, &c., hath privately removed himself out of the county, &c. The question was whether this attachment will lie, notwithstanding the 6th section of the Act of Congress concerning the District of Columbia. [2 Stat. at Large, 103.]

The COURT ordered the judgment to be entered. KILTY, C. J., doubting.

NEGRO PATTY v. EDWARD EDELIN.

The plaintiff is not obliged to join in demurrer to the evidence unless the demurrer expressly admits every fact which the jury might reasonably infer from the testimony. But if demurrer be joined, the court will infer what the jury might infer.

Mr. Swann, for the defendant, offered a demurrer to the evidence, stating the testimony only as delivered by the witnesses for the plaintiff.

Mr. Jones, for the plaintiff, objected to join in demurrer, because it did not state the facts which might be inferred from the testimony. *Cocksedge v. Fanshaw*, Doug. 131; *Hoyle v. Young*, 1 Wash. 151; *Buller*, N. P. 313, and *Thweat v. Finch*, 1 Wash. 220.

The COURT was of opinion that the plaintiff was not obliged to join in demurrer, unless the defendant would admit those facts which the jury might reasonably infer from the testimony. But that if such a demurrer, stating the testimony of facts, and not the facts themselves, be joined, then the Court are bound to infer, against the party demurring, every fact which a jury might reasonably have inferred from the testimony so stated.

The Court refused to compel the plaintiff to join in demurrer, unless the defendant would admit that he hired the plaintiff to Henry Lyles; a fact which they thought the jury might reasonably infer from the testimony.

COMMONWEALTH OF VIRGINIA v. BEALE HOWARD.

No information or indictment will lie upon a by-law of the corporation of Alexandria.

INFORMATION for keeping a slaughter-house in Alexandria, contrary to a by-law of the corporation.

Special Verdict. Motion in arrest of judgment. This prosecution was commenced in the Court of Hustings, of Alexandria.

Mr. Simms and *Mr. E. J. Lee*, for the defendant.

The offence is not indictable, and no information will lie where an indictment will not. As much strictness is required in an information as in an indictment. No indictment will lie but for a public offence. This is only an offence against the by-law of a corporation. 4 Bac. Ab. 654; 2 Inst. 131, 163. No indictment will lie on a by-law. *Rex v. Sharpless*, 4 T. R. 777. Corporate powers are of a private nature. The trustees of an academy, or of a library, or of an insurance company have power to make by-laws, as well as the corporation of Alexandria, and yet it will hardly be contended that an indictment would lie for a breach of one of those laws. The charter of Alexandria gives all penalties of by-laws to the use of the town. The person to whom the penalty is to accrue, is the only person who can prosecute for the offence. The commonwealth of Virginia had no right to call upon the defendant for this penalty. A penalty of a by-law may, in all cases, be recovered by action of debt or assumpsit.

Mr. Mason, *contrà*.

Because an action of debt or assumpsit will lie, it does not follow that an information will not. An information will lie, in many cases, where an indictment will not. There is a difference between private and public corporations. The act of incorporation of Alexandria is a public act. The Court of Hustings was a part of the corporate legislature. This court is now sitting here, in these cases, as a Court of Hustings. If a private act be referred to in a public act, the former becomes a public act. 3 Inst. 230.

Mr. Simms, in reply.

The Act of Assembly of Virginia, which incorporates the town of Alexandria, is itself a private act; and surely a by-law of a corporation, deriving its powers from a private act, can never rise to a public act. Although the Court of Hustings was a part of the corporate legislature, yet they were bound to decide agreeably to the principles of the common law. No case can be found of an indictment on a by-law.

Camellos v. Reverez.

At April term, 1802, the judgment was arrested; the COURT being of opinion that no indictment or information would lie on a by-law of the corporation of Alexandria.

UNITED STATES v. R. B. JAMESSON.

The want of the name of a prosecutor at the foot of the indictment is not a good ground for arresting the judgment.

A *capias* is proper process upon an indictment for misdemeanor.

INDICTMENT, for assault and battery:

Motion in arrest of judgment. 1st. Because there is no name of a prosecutor indorsed on the indictment, agreeably to the Act of Virginia. Rev. Code, p. 112, § 24. 2d. Because a *capias* was not the proper process. Rev. Code, p. 112, § 28.

The COURT was of opinion that the 24th section applied only to cases where an information was filed without a previous presentment. There may not be a prosecutor, and crimes ought not to go unpunished.

Motion overruled and judgment entered.

McGILL v. SHEHEE.

If judgment be rendered against the defendant in a cause which has been continued at the costs of the defendant the Court will not issue an attachment against the defendant, for the costs of the continuance.

MOTION for an attachment of contempt against the defendant, for not paying the costs of a former continuance, the cause having been continued, at October term, at the cost of the defendant. The cause had been tried at this term, and judgment for the plaintiff.

Motion overruled.

CAMELLOS v. REVEREZ.

Upon proof of fraud, the Court will refuse to permit the debtor to take the insolvent oath under the law of Virginia.

The COURT refused to permit the plaintiff to take the insolvent oath, under the law of Virginia, on proof of his fraud in running away from the Havannah, and secreting property to the amount of \$6,000.

CIRCUIT COURT OF THE UNITED STATES.

WASHINGTON, MARCH TERM, 1802.

URIAH FORREST v. SAMUEL HANSON.

A plea of justification in slander, must be substantially proved.

A breach of trust accompanied by falsehood does not amount to swindling, unless also accompanied by an intent to defraud.

The Court is not bound, at the request of either party, to instruct the jury after they have retired to consider of their verdict, unless the jurors themselves request such instruction.

It is actionable to say of a director of a bank, that he is a swindler.

In slander a verdict for one cent damages carries full costs.

The statute of Gloucester is, but the statute 21 Jac. c. 16, respecting costs, is not, in force in Maryland.

ACTION on the case for words. The plaintiff declares that being a director of the Bank of Columbia, the defendant, on the 1st of June, 1801, in a certain discourse had concerning the plaintiff, as one of the directors, &c., spoke the following false, scandalous, &c., words, of him, as a director, &c., "General Forrest is a liar and a swindler, and I can prove him to be so. I, as cashier, say so of one of the directors, and I think one or the other of us ought to be turned out of the bank." The 2d count states also the words liar and swindler (with this innuendo,) meaning that the said Uriah Forrest had been guilty of falsehood, fraud, deceit, knavery, and dishonesty in his conduct, as one of the directors of the Bank of Columbia, whereby the plaintiff is injured in his good name, as one of the directors of the said bank, and his credit with the bank impaired, and he has been in danger of being turned out of the bank, and of losing his office as director, &c.

The defendant pleaded in justification fourteen pleas, each plea containing a separate fact or transaction, upon which issues were joined. In the trial of the cause, at September term, 1801, the jury having retired to consider of their verdict, and before they had agreed, requested leave to return into court and ask the opinion of the Court upon a question of law; whereupon, being

brought into Court, they asked whether they could find a verdict for the defendant upon any one plea if all the facts stated in such plea should not have been proved to their satisfaction.

The Court, thereupon instructed them that the facts stated in such plea must be substantially proved, and that where fraud was alleged in the plea, there fraud must be proved; and that where falsehood and deceit were alleged in the plea, there falsehood and deceit must be proved; to which opinion of the Court and instruction the counsel for both parties assented. Whereupon the jury retired again, and not agreeing upon any verdict after being together some hours, the Court ordered the jury to be brought into court, and informed them that if they had any doubt upon matter of law they might inquire of the Court.

Whereupon the jury asked the opinion of the Court whether a breach of trust accompanied with falsehood amounted in law to swindling. To which the Court replied "No, unless accompanied also with an intent to defraud."

The counsel for the defendant then moved the Court (while the jury remained standing at the bar) to instruct the jury that if they find the facts stated in any one plea to be substantially true, they should find the issue upon that plea for the defendant, although such facts do not amount to the crime of swindling in its legal acceptation.

But the Court refused so to instruct the jury. First, because they did not think themselves bound to instruct the jury, after having retired to their room unless the jury should request such instruction. And secondly, because they conceived they had already substantially instructed the jury to the same effect, in giving the instruction above stated.

The jury found a verdict for the plaintiff, with one cent damages.

The defendant moved, in arrest of judgment, because the words are not actionable; and also contended that the plaintiff was not entitled to full costs, because the verdict was for only one cent.

This motion was argued at December Term, 1801, by *Mr. Simms* and *Mr. Jones*, for the defendant, and by *Mr. Dennis*, *Mr. Gantt*, and *Mr. C. Lee*, for the plaintiff.

1. For the defendant, it was contended that swindler is a word of uncertain meaning. It is not to be found in any dictionary. There is no statute against swindling. The term does not imply, in this country, any particular crime punishable by law. Words are not actionable in themselves unless they contain a charge of a crime for which the plaintiff might be punished by law. 1 Com. Dig. 266, 267; *Onslow v. Horne*, 3 Wils. 177. The act of 30 Geo. 2, c. 24, respecting false pretences, is not in force in

this country. The offences described in that act were not before cognizable by law; and the word swindler has been introduced since that statute, and is understood to indicate the offences created by it. 2d. As to costs. At the common law no costs were given. They were first given by the statute of Gloucester. The statute of James (21 Jac. I. c. 16, § 6,) respecting costs in actions of slander, where the damages are assessed at less than forty shillings is in force in Maryland. Acts of Maryland, 1785, c. 87, § 2. By the practice of the General Court of Maryland, no costs are given when the sum recovered is not sufficient to support the jurisdiction.

For the plaintiff, it was said, 1st, That the words were actionable in themselves; 2d, That they were actionable by reason of their being spoken of the plaintiff in his official character. 3d, That the statute of Gloucester was, and that of James not in force in Maryland. The following authorities were cited. *J. Anson v. Stuart*, 1 T. R. 748; *Berryman v. Wise*, 4 T. R. 366, 1 Dallas, 335-338; 2 Dallas, 297; 4 Bac. Ab. 487, 484, 485, 506; *Hoyle v. Young*, 1 Wash. 152; *Rue v. Mitchel*, 2 Dallas, 58; 4 Bac. Ab. 489; 1 Com. Dig. 180; Herty's Laws of Maryland, 86, 1793, c. 30, § 12; Stat. 30 Geo. 2 c. 24; Police of London, 105; *Mesca's case*, 1 Dallas, 74, 75; Esp. N. P. 504; 6 Bac. Ab. 222, 223; Stat. 33 Hen. 8; Charter of Maryland, § 10; Act of Maryland, 1763, c. 18; 1785, c. 87, § 1; 1713, c. 4, § 3; 1763, c. 23, § 4; 1771, c. 11, § 2-4; Entick's Dictionary—"Swindler;" Bullock's Law of Costs, c. 1; 3 Bl. Com. 400.

At this term, the Court gave judgment for the plaintiff with full costs.

CRANCH, J. In this case, it is not necessary to consider whether the words would be actionable in themselves, if not spoken of a person who exercises an office of trust, because the plaintiff has grounded his action upon the speaking of the words respecting him in his official character as a director of the Bank, and the words are alleged to be spoken of his official conduct. The question then is, whether these words, spoken of the official conduct of a person who holds an office of trust, are actionable? There is no doubt that words not actionable when spoken of a common person, may become actionable when spoken of an officer, and in relation to his official conduct. The general rule is laid down in 4 Bac. Ab. 489, thus: "As all words spoken of any person who is in the enjoyment of an office of honor, profit, or trust, which import a charge of unfitness to discharge the duties of the same, must be prejudicial to such person; these have, and with good reason, been always held to be in themselves actionable; but wherever words, in themselves not actionable, become so by being

spoken of a person in office, it must appear from the words themselves, or from the pleadings, that they were spoken in a *colloquium* concerning his office; for the very foundation of the action is its being a disgrace in office." If this is law, (and the whole course of authorities proves it to be so) — if the office of director of the Bank of Columbia is an office of trust; if the plaintiff was a director at the time of the speaking of the words; if the words import an unfitness to discharge the duties of that office; and if it appears, from the words themselves, or from the pleadings, that they were spoken in a *colloquium* concerning that office, then it follows as an irresistible consequence, that the words thus spoken are actionable, and judgment must be rendered for the plaintiff. This is the result of a comprehensive view of all the cases decided on the subject. The next question is, whether the office of director of the Bank of Columbia is such an office of trust as is contemplated by the law? That it is an office of trust seems to be proved by the words of the act incorporating the Bank. By that act the directors are intrusted with the power of "regulating the affairs of the Bank — of choosing a president and a cashier — of determining upon the manner of doing business, and the rules and forms to be pursued — of appointing and paying the various officers they may find necessary, and finally of disposing of the money and credit of the Bank in the common course of banking, for the interest and benefit of the proprietors," &c., and by the 12th section any director who shall commit any fraud touching the money or property of the bank is liable to be prosecuted by indictment. It appears, then, that the office of director is an office of high trust and responsibility. The cases in the books speak not only of words being actionable by reason of their being spoken of judges and the higher judicial officers and justices of the peace, but also of sheriffs, stewards of courts-leet, church-wardens. (Style, 338; *Woodruff v. Wesley*, Carth. 1); town clerk, (Godbolt, 157, pl. 211; Yel. 142); a constable, (Yel. 153); a deputy-clerk to an arch-deacon's register, (*Reignald's case*, Cro. Car. 563); and even a clerk to the Company of Merchant Tailors, (Cro. El. 358); and the steward of a private gentleman, (*Seaman v. Biggs*, 3 Cro. 480.) Surely some of these offices are not more respectable, or of higher trust or responsibility than that of a director of a bank. In *Sir Richard Greenfield's case*, March, 82, pl. 135, it is said, "that it is not material what employment he hath under the King, if he may lose his employment or trust thereby." In the case of *Woodruff v. Wesley*, Carth. 1, the action was for words spoken of a church-warden. A *colloquium* was laid of the office. Bridgman, C. J. said, "that to say he hath cheated me, are words of passion; but if applied to a man in his office, the

action will lie ; and so it must be adjudged." In the case of *Wright v. Moorehouse*, Cro. Eliz. 358, words spoken of the clerk of the Merchant Tailors were held actionable on account of the office. In the case of *Strode v. Homes*, Style, 338, words spoken of a church-warden were also held to be actionable on account of the office ; and Rolle, C. J. said, " officers which have no benefit by their offices have more need to be repaired, if they be scandalized in their execution of them ; and here the scandal is a great loss to an honest man ; and what other remedy can he have to repair himself, but by this action on the case ? " The office of a director of a bank is clearly within the reason of the cases ; and therefore is within the law. The next question is, do the words import an unfitness to discharge the duties of the office ? Upon this point, I presume there can be no difference of sentiment. No man will say that a liar and a swindler is a fit person to be intrusted with the office of a director of a bank. In 1 T. R. 753, it is said to be formerly held that the word swindling was in general use, and that the Court could not say they were ignorant of it. In the same case, Ashhurst, J., held it to imply crimes for which the person might be indicted ; and Buller, J., said it contained as libellous a charge as can well be imagined. In *Berryman v. Wise*, 4 T. R. 366, there was no question but the word was actionable when applied to an attorney in his official character ; and in the argument of the present case, it seemed to be agreed that it was a word which had come into use since the statute of 30 Geo. 2, c. 24, and was generally understood to imply a charge of the crimes, or some of them, mentioned in that statute. One of the principal offences mentioned in that statute, and the one to which the term swindling seems to be most appropriately applied, is that of " knowingly and designedly, by false pretences, obtaining from any person money, goods, &c. with intent to cheat or defraud any person of the same." This offence is substantially and accurately the common law offence of cheating, which is described in 1 Hawk. P. C. 343, to be " deceitful practices, in defrauding, or endeavoring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty." To charge a man with swindling, seems, therefore, to be substantially to charge him with an offence for which he may be liable to a prosecution at common law. I have before observed that it is not necessary in this case to decide whether the words were actionable in themselves, in the strict signification of the phrase, but I can have no doubt of their being actionable when applied to a man either in his professional or official character. No man in the least acquainted with the world, particularly with the com-

mercial part of it, can say that he does not know the meaning of the word. Everybody knows that it implies a high degree of moral depravity, and that its essence is fraud. No one will say that it is not totally incompatible with that strict integrity of character which ought to be the first qualification of a director of a bank, and no one will say that it does not destroy all idea of fitness for the high trust of that office.

The last question on this point is, whether it appears from the words themselves, or from the pleadings, that they were spoken in a *colloquium* concerning that office? To decide this question, it is only necessary to read the declaration. It states that the plaintiff was a director of the Bank of Columbia, and as such had well demeaned himself, &c., yet the defendant knowing, &c. but intending, &c. and to have the plaintiff turned out as a director, and to prevent him from having and obtaining credit at the bank, on the 1st of June, 1801, in certain discourse had concerning the plaintiff, as one of the directors of the said bank, spoke the following words: "General Forrest is a liar and a swindler, and I can prove him to be so; I, as cashier, say so of one of the directors, and I think one or the other of us ought to be turned out of the bank."

From this it appears that there is not only an express *colloquium* laid of him as director, but it also appears clearly from the words themselves, that they were spoken of him in his official character. The fact, that the plaintiff was a director of the Bank of Columbia, is admitted by the pleadings and verdict. Upon the question whether the plaintiff shall recover his full costs, I have no doubt. The statute of Gloucester is the foundation of costs in Maryland. It seems to have been in force from the first settlement of the country, and gives costs in all cases where damages are recovered. The statute of 21 James, c. 16, does not appear to have been at any time practised upon in Maryland; and there seems to be good reason why it has not. It was not applicable to the circumstances of this country. The intention of that statute was to prevent trifling actions of slander from being brought in the Superior Courts in England. It was never construed to extend to those courts whose jurisdiction was limited to actions of forty shillings value; 6 Vin. Ab. 530; Ld. Raym. 181, 182; consequently the statute was of a local nature, and only applicable to the peculiar relative situation of the courts in England, and even there, if the action was carried up to the courts at Westminster Hall by *habeas corpus* or *certiorari*, and damages assessed under forty shillings, yet the plaintiff had his full costs. 6 Vin. 356; Ld. Raym. 395; 1 Bac. Ab. 514; 7 Mod. 129; 4 Mod. 378. The question made at the bar, whether that statute passed

before or after the first emigration of inhabitants to Maryland, seems to me of little importance as to the present point. For if it passed prior to that date, still it is not law by virtue of the declaration of rights in Maryland, unless it had by experience been found applicable to their circumstances, before the year 1776. This experience could only be by practising upon it in courts of law. And if it was passed after the date of the first emigration to Maryland, it would still have no force here, unless it had been practised upon by courts of law or equity prior to the same year. So that it is not necessary to ascertain the precise time of the first emigration to Maryland. No case having been produced in which the statute of James has been practised upon in Maryland, we cannot consider it as in force here; and if it is not, there is nothing to prevent the full operation of the statute of Gloucester, which gives costs in all cases where damages are recovered. The jurisdiction of this court is unlimited by the amount of the claim, or of the verdict, in actions of slander; for although the Court has decided that the justices of the peace have exclusive original jurisdiction in all cases where they have cognizance, yet the justices have no cognizance of actions of slander.

For these reasons, I am clearly of opinion, that the plaintiff ought to have his judgment, with full costs.

MARSHALL, J., and KILTY, C. J., assented.

O'NEAL'S LESSEE v. JOEL BROWN.

In ejectment for a lot in Washington, it is not necessary to show a grant from the State of Maryland. The Act of Cession by Maryland to the United States, transferred to the United States all the right of the State of Maryland to the ungranted land in this part of the District of Columbia.

The deed of trust of the original proprietor cannot be set up against the *cestui que trust*.

By the Acts of Maryland, 1791, c. 45, § 2, and 1793, c. 58, the legal title vests in the *cestui que use*.

The commissioners were authorized to sell the public lots in Washington in April, 1797.

EJECTMENT for Lot No. 10, in the Square No. 78, in the city of Washington. The plaintiff proved that in the year 1784, and from that time to the 20th of June, 1791, Benjamin Stoddert and James M. Ligan were and continued in peaceable and undisturbed possession of the land comprehended in the Square, No. 78, in their own right and claiming to be proprietors thereof in fee-simple. That on the said 20th of June, 1791, they being so in possession, conveyed the said land by deed duly executed to Thomas Beall of George, and John Mackall Gantt, in trust,

among other things, to be laid out with other lands for a federal city, with such streets, squares, parcels, and lots as the President of the United States for the time being should approve; and that the said trustees should convey to the commissioners, for the time being, appointed by virtue of the Act of Congress for establishing the temporary and permanent seat of the government of the United States, and their successors for the use of the United States, all the said streets and such of the said squares, parcels, and lots as the President should deem proper for the use of the United States. And as to the residue of the said lots, that a fair and equal division of them should be made, and that such as should be divided or allotted to the said proprietors, should be by the said trustees conveyed to the said proprietors; and that the said other lots should and might be sold at such times, in such manner, and on such terms as the President of the United States for the time being should direct; and that the said trustees should, on the order of the President, convey the lots so sold to the respective purchasers. The plaintiff also produced the order from the President of the United States to the commissioners, dated September 16, 1793, authorizing them to sell any of the last mentioned lots, at such times, in such manner, and on such terms as they should deem proper. The plaintiff also produced the Acts of Assembly of Maryland, 1791, c. 45, and 1793, c. 58, and the Act of Congress of the 6th of May, 1796, [1 Stat. at Large, 461.] He also produced the record of the division of the Square No. 78, between the said Stoddert and Linigan, and one Uriah Forrest, as original proprietors on one part, and the commissioners on the other, in which division the Lot No. 10 was assigned or allotted to the public, and declared liable to be sold agreeably to the deed of trust. And lastly, he produced the certificate of the commissioners duly recorded, dated April 7th, 1797, in which they certify that the plaintiff's lessor had purchased the Lot No. 10, for two hundred dollars, and acknowledged the payment of the whole purchase-money. Upon this title the plaintiff relies.

The defendant prayed the Court to instruct the jury that the plaintiff has not made out a sufficient title to enable him by law to recover, and relies on two objections. 1st. That the plaintiff has not shown any grant from the lord proprietor, nor from the State of Maryland, nor from the United States. 2d. That the commissioner had no power to sell lots on the 7th of April, 1797; 1st, because the words in the deed of trust, "President of the United States, for the time being," mean the President of the United States at the time of the sale. But at the time of sale, Mr. Adams was President, and the orders produced were given

United States v. McGurk.

by General Washington, when he was President. And 2d, because whatever powers of sale the commissioners might have had by virtue of those orders, were taken from them by the Act of Congress, of May 6th, 1796, [1 Stat. at Large, 461,] respecting the loan, by which all the public unsold lots were rendered liable to indemnify the United States against their guaranty of that loan.

Mr. Mason for the plaintiff.

Mr. Gantt for the defendant.

The COURT refused to give the instruction prayed by the defendant, and gave their reasons at length, the purport of which was — That if the land had not been granted by the lord proprietor, nor by the State of Maryland before the Act of Cession by the State of Maryland and the acceptance by Congress, the right of the State passed to the United States by the cession and acceptance. And the sale made under the Act of Congress, of 1796, was the first grant, and therefore good. That if Stoddert, Lingan and Forrest were lawfully seized, in 1784, and conveyed the land in trust, the deed of trust cannot be set up to defeat the title of *cestui que trust*. That the Legislature of Maryland, in 1791 and 1793, had a right to legislate respecting private rights to the property, and were competent to enact in what mode the use of the property, the legal title to which was vested in the trustees, should be declared, and should pass. That when the right of *cestui que use* accrued the legal title, by virtue of the act of 1793, vested, and followed the use, in a manner analogous to the operation of the English statute of uses. That the question respecting the words “President for the time being,” did not arise in the case, because the sale was made under the Act of Congress, of 1796. The plaintiff was not bound to show the authority given by the President to the commissioners to sell under that act, because it was not to be presumed to be in his power, and was not a matter of record.

NOTE. — These reasons are given from memory, which at this time (Oct. 27, 1805,) may not be perfectly accurate. — *W. C.*

 UNITED STATES v. JAMES MCGURK.

On a trial for murder the dying declarations of the deceased are evidence.

INDICTMENT, for the murder of his wife, by beating her, while pregnant with twins, so as to produce a miscarriage and consequent death.

The COURT permitted her dying declarations to be given in evidence.

 Alricks v. Slater & al.

The authorities, cited upon the trial were : 1 Hawk. 124 ; Foster's Cr. Law, 256, 138, 259 ; Leach's Crown Cases, 141 ; 4 Bl. Com. 195 ; 1 Gilb. L. E. 303 ; 2 Hale, 289 ; *Woodcock's case* ; Leach's Cr. Ca. 437, 563, case 218 ; 1 Bl. Com. 442.

The prisoner was condemned, and executed October 28th, 1802.

 VOSS v. TUEL.

Bail required in trespass for cutting up a scow.

TRESPASS, for cutting a scow to pieces.

The plaintiff made affidavit that he had been informed and believed that the defendant with others had cut up and carried away his scow, and that it was worth one hundred dollars, and that he apprehended the defendant would leave the district upon the issuing of process against him, unless he should be held to bail.

The COURT refused to permit the defendant to appear without special bail. MARSHALL, J., absent.

 MEADE v. ROBERTS.

Upon calling the appearance docket, if the defendant offers to appear, the court will not give the plaintiff's attorney time to procure an affidavit to hold the defendant to special bail.

MOTION to appear without special bail, there being no cause of action filed.

Mr. Woodward, for the plaintiff, produced an account, but no affidavit. The COURT decided it to be insufficient to hold to bail. *Mr. Woodward* requested time to get an affidavit.

The COURT were of opinion that the defendant had a right now to appear, and they could not amerce the marshal when an appearance was offered, unless there appeared to be a good cause of action.

MARSHALL, J., absent.

 ALRICKS v. SLATER & AL.

The court will not permit a plea to the merits to be withdrawn to enable the defendant to demur specially.

DEBT ; plea, payment ; replication and issue.

The defendant Slater only was taken. The penal bill upon which the action was brought, was signed "David Slater & Co." and a seal.

Gantt, for the defendant, moved for leave to withdraw his plea of payment, and demur to the declaration; because a seal affixed for David Slater & Co., by one only of the partners, is the seal of him only who affixed it.

The COURT refused.

ELEANOR HIGGINSON'S CASE.

A witness, who for want of surety to appear and testify, has been imprisoned, is entitled to the daily compensation for the time of imprisonment.

ELEANOR HIGGINSON had been ordered by a justice of the peace to recognize with surety in a small sum, to appear and testify as a witness against Daniel Hennessee, on a charge of felony; but being a stranger and unable to get surety, she had been committed to prison and detained until the trial.

Mr. Mason, Attorney for the United States, moved that she should be allowed payment for her attendance during the whole time she was so detained. The act of 1753, c. 13, only provides for the payment of the prison fees, and makes no allowance for the time of the witness.

The COURT allowed the witness to prove her attendance, and ordered her to be paid for the whole time she was detained, it being her misfortune and not her fault that she could not obtain security for her appearance.

BOYER v. ROBERTS.

No civil cause is to be tried, except by consent, unless it has stood one term at issue.

THE plea was filed at the last term, but the issue was not made up until the present term.

Mr. Woodward, for the plaintiff, contended that he was entitled to a trial at this term, and cited the Act of Maryland of 1763.

Mr. Peacock, for the defendant, moved for a continuance on the rule of the court, that no cause should be forced to trial unless it had stood one term at issue; and on that ground the cause was continued.

Hodgson v. Turner.

UNITED STATES v. PUMPHREYS.

Extorted confession is not evidence against the prisoner.

INDICTMENT for stealing.

The COURT instructed the jury that no confession, extorted from the prisoner, by threats of punishment, or obtained by the promise of reward or favor, was evidence against him. 4 Bl. Com. 357.

BOWMAN v. FRENCH.

The defendant will not be ruled to argue a demurrer at the term in which the demurrer shall be joined by him, although the rule to join in demurrer shall have expired before the term.

MISNOMER of the defendant was pleaded in abatement. The plaintiff demurred at last term, and laid a rule on the defendant to join in demurrer. The defendant failed to join in demurrer, on the rule day; and *Mr. Dorsey*, for the plaintiff, now moved for judgment by default on the rule, unless the defendant will argue the demurrer at this term.

The COURT refused to give judgment; permitted the defendant now to join in demurrer; and obliged the plaintiff to lay a rule on the defendant to argue it at the next term.

CRANCH, J., *contra*.

HODGSON v. TURNER.

In an action against the indorser of a foreign bill of exchange, for non-payment, it is not necessary to produce a protest for non-acceptance.

A judgment and execution by the plaintiff, against the drawer of a bill, is no bar to a judgment against the indorser, although that execution be levied on the drawer's goods, which are not sold for want of buyers.

THE defendant was indorser of a foreign bill of exchange, protested for non-payment as well as for non-acceptance.

Mr. Gantt, for the defendant, prayed the Court to instruct the jury that it was necessary for the plaintiff to prove that the defendant had reasonable notice of the protest for non-acceptance; and cited *Kyd*, 109, 117, 118, 119, 137; *Milford v. Mayor*, Doug. 55; *Buller's N. P.* 271; *Rogers v. Stevens*, 2 T. R. 713; *Goodall*

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v. *Dolley* 1 T. R. 712; Burr. 2670; and the case of *Oates & Co. v. McCurdy*, in the General Court of Maryland.

Mr. Mason, for the plaintiff, cited *Brown v. Barry*, 3 Dal. 365; and *Clarke v. Russel*, 3 Dall. 420, 424.

The COURT, on the authority of *Brown v. Barry*, and *Clarke v. Russel*, refused to give the instruction as prayed.

Mr. Gantt, for the defendant, then produced a *fiery facias*, issued last term and returnable to this, on a judgment obtained by the plaintiff against Bowie, the drawer of this bill; on which execution he stated the marshal had seized the goods of Bowie, but that they were not sold for want of buyers; and prayed the Court to instruct the jury that this execution so levied, was a discharge of the indorser. Selden's Practice, 564.

The Court refused to give the instruction.

HOGAN v. BROWN.

In an action for slander, if it appears, from the plaintiff's testimony, that at the time of speaking the words the defendant named his author, who was a responsible man, the defendant may avail himself of that testimony without pleading the matter as a special justification.

SLANDER. The words laid in the declaration were, "you stuck a pitchfork into a man in Ireland, and murdered him and fled."

The plaintiff's witness proved that the defendant said that he had heard one Tweedy say that Burke told him that the plaintiff had killed a man in Ireland, with a pitchfork, and had fled for it.

Mr. Mason, for the defendant, in cross-examining the plaintiff's witness, asked him whether Burke was a responsible man; whether he lived in the city at that time, &c.

Mr. Peacock, for the plaintiff, objected to the questions, contending that if the defendant meant to rely upon the fact of the defendant's having named his author at the time, he ought to have pleaded it, and cannot give testimony of that kind on the general issue.

Mr. Mason, in reply, was stopped by the Court, who said the objection was premature. The defendant's counsel were only cross-examining the plaintiff's witness. The plaintiff must make out his case; and although he is not bound to prove the words exactly as laid, yet he must prove words which were actionable and in substance as laid. But if the plaintiff's witness proves that the words spoken were substantially different from those laid, and the words proved are not actionable as spoken, there is no necessity for the defendant to plead those facts which come from the plaintiff's own witness.

Neale v. Coningham.

Mr. Peacock then prayed the Court to instruct the jury that the words proved were in substance the same as those charged in the declaration.

But the COURT refused, being of opinion that they were substantially different.

CRANCH, J. When the defendant means to prove other words spoken at the same time with those laid in the declaration and which make the words laid, not actionable, then, in order to enable the defendant to bring testimony of those other words he must plead his justification specially. But if the plaintiff's evidence proves words which justify the defendant, or which show that the words charged are not actionable as spoken, there the defendant may take advantage of them without pleading specially. For the plaintiff must make a good cause of action, and if it appears from his own evidence that the words charged are not actionable as spoken, he fails to support his cause of action.

But KILTY, C. J., and MARSHALL, J., were of a different opinion.

NEALE v. CONINGHAM.

A witness who cannot testify in a cause without criminating himself shall not be sworn.

TRESPASS, for assault and battery, and false imprisonment.

Mr. Peacock, for the plaintiff, produced Richard Spaulding, to prove that the plaintiff was arrested and confined in prison upon a *ca. sa.* issued by the defendant as a justice of the peace for Washington county, on the 28th of March 1801, on a judgment rendered by Amariah Frost, a justice of the peace of Prince George's county, on the 24th of September, 1800. The witness objected to being sworn because he was the constable who served the *ca. sa.*, and also the jailor who kept the plaintiff in confinement, and his testimony would criminate himself.

The COURT refused to compel him to be sworn.

CRANCH, J., *contra*. It is not an objection to his being sworn, but is a good reason for his refusing to answer any question which may criminate himself.

MILBURNE v. KEARNES.

Leave to defendant to amend on payment of costs of the term or a continuance at the plaintiff's option.

TRESPASS. Assault and battery. Leave was given to the defendant to strike out his plea of *son assault demesne*, and plead *molliter manus imposuit*, on payment of the costs of the term to this time, or a continuance at the option of the plaintiff.

KILTY, C. J., absent.

R. & G. BARRY v. LAW.

A conditional promise to pay the debt of another is within the Statute of Frauds. An entry in the defendant's books, not signed by any one, is not a sufficient note in writing to take the case out of the statute.

ASSUMPSIT. 1st count, money had and received. 2d, a special promise to pay for planks and timber sold by the plaintiffs to Bryan, in consideration that the plaintiffs would forbear to sue him. 3d, *indebitatus assumpsit* for planks, &c., sold to the defendant himself.

The case, in evidence, was, that Bryan had contracted with Mr. Law to build stables, and furnish materials. That Bryan purchased of the plaintiffs planks, &c., to the amount of \$135⁹⁷/₁₀₀. Bryan, at the foot of the plaintiffs' account rendered, drew an order on Mr. Law, in these words: — "Sir, please to pay to R. & G. Barry the above account, being lumber used in building your stables, and charge your humble serv't. B. Bryan." "To Tho. Law." This order was not on stamped paper.

The defendant, on the 6th of December, 1800, made an entry in his books, as follows: "Stables on Sq. 693, Dr. To am't of Capt. Barry's bill, \$135.97," and promised the plaintiffs that if so much was due by him to Bryan, the bill should be paid.

The COURT refused the order to go in evidence to the jury because it was not stamped.

They also instructed the jury that the plaintiffs could not recover on the defendant's promise, unless he had signed a note in writing promising to pay, &c. That it being a conditional promise did not take it out of the statute of frauds. And that the entry in the defendant's books was not a sufficient note in writing to charge the defendant.

They refused to instruct the jury that if at the time of the promise the defendant was indebted to Bryan in a sum equal to

 Gardner's Administrator v. Lindo.

the plaintiffs' claim, the evidence was applicable to the count for money had and received.

KILTY, C. J., absent.

 UNITED STATES v. McDONALD.

The marshal is entitled to a fee of ninety pounds of tobacco for impanelling a jury in a criminal prosecution.

CA. SA. for a fine.

Mr. Mason, Attorney for the United States, moved the Court to strike out of the execution, the charge of ninety pounds of tobacco for a fee to the marshal for impanelling a jury; contending that the charge was not authorized by law. But the COURT rejected the motion, after considering the Act of Congress of 27th Feb. 1801, concerning the District of Columbia, [1 Stat. at Large, 103]; and the Act of 28th Feb. 1799, providing compensation for the marshals, &c. [1 Stat. at Large, 624]; and the Act of Assembly of Maryland, Nov. 1799, c. 25, regulating officer's fees.

 KROUSE v. SPROGELL.

Leave to amend.

CASE. Leave was given to defendant to withdraw the general issue, and file a general demurrer, on payment of the costs of the term.

 GARDNER'S ADMINISTRATOR v. LINDO.

The record of a Court in Virginia must be certified by the presiding magistrate.

The act of limitations cannot be given in evidence upon the plea of *nil debet*.

Debt will lie against the maker of a promissory note.

After verdict it is too late to object the want of *profert* of letters of administration — or that the action is in the *debet* and *detinet*.

DEBT against the maker of a promissory note — *pleas nil debet*, and a discharge under the insolvent Act of Virginia.

The COURT, refused to admit the record of the discharge to be given in evidence because it was not authenticated by a certificate of the presiding magistrate, according to the Act of Congress. [1 Stat. at Large, 122.]

O'Neale v. Brown.

Mr. Mason, for defendant, contended that the act of limitations might be given in evidence on *nil debet*. Esp. N. P. 147, 262; *Roades v. Barnes*, 1 Burr. 9; *Draper v. Glassop*, *Ld. Raym.* 153; *Darby v. Boucher*, 1 Salk. 278.

Mr. Woodward, for plaintiff. There is a difference between debt for rent, and debt on a bond or note. In the first case the debt arises only from the enjoyment of the thing demised. But upon a bond a debt is acknowledged. Esp. N. P. 233, 234.

The COURT refused to admit the act of limitations to be given in evidence, (see 1 Cr. Rep. 343, 462, 465.) After verdict for the plaintiff, it was moved, in arrest of judgment, 1st, That debt will not lie on a promissory note. 2d, That it does not appear that letters of administration were granted to the plaintiff. 3d, That the action is in the *debet* and *detinet*.

The Court, at a subsequent term decided that debt would lie on a promissory note, and that the other two objections were too late after verdict.

Reversed by the Supreme Court of the United States, (1 Cranch, 343,) because an action of debt will not lie in Maryland, upon a promissory note.

THOMPSON v. LACY.

An inhabitant of Alexandria county may be arrested in Washington county without a *non est* in Alexandria county.

THE defendant, being an inhabitant of Alexandria county, was arrested in Washington county, no writ having issued against him in the former county.

Motion for a nonsuit, under the Act of Maryland 1796, c. 43. Refused.

O'NEALE v. BROWN.

In trespass the plaintiff cannot recover damages for erecting a fence and obstructing his windows unless he was in possession at the time of erecting the fence. A certificate in fee from the Commissioners of Washington is not evidence of possession.

TRESPASS. The declaration stated that on the 25th of February, 1800, the plaintiff being in possession of part of Lot No. 10, in Sq. 78, in the city of Washington, the defendant entered with force and arms, &c., and having so entered, afterwards, to wit, on the 22d of August, 1801, erected a wooden fence thereon

so as to obstruct the plaintiff's windows on Lot No. 9, and other enormities, &c.

Mr. Gantt, for defendant, prayed the Court to instruct the jury that the plaintiff ought not in this action to recover damages for erecting the fence and obstructing his windows, unless the plaintiff proves possession in himself at the time of the defendant's erecting the fence.

The Court gave the instruction as prayed. Because the plaintiff in the declaration has stated a *disseisin* by the defendant nineteen months before the erecting of the fence, and it is not laid with a *continuando*. The erecting of the fence therefore cannot be connected with the entry laid; and the plaintiff must prove a reëntry, or possession in himself after the first *disseisin* and before the erection of the fence.

Mr. Gantt then moved the Court to instruct the jury that they could not give damages for the forcible entry laid in the declaration.

But the Court refused.

Mr. Woodward, for the plaintiff, then moved the Court, to instruct the jury, that they may give damages for erecting the fence, under the general allegation of other enormities; — which the Court also refused.

Mr. Woodward then moved the Court to instruct the jury that the certificate in fee from the commissioners of the city to the plaintiff (which by the Act of Maryland of 1793, ch. 58, is equivalent to a deed of bargain and sale,) was evidence of the plaintiff's possession.

But the Court refused to give such instruction.

CURRY v. LOVELL.

It is no bar to execution upon a *supersedeas* in Washington county, that the plaintiff has recovered another judgment in Alexandria county upon the same cause of action, if it be not satisfied.

RULE to show cause why this execution should not be quashed.

Curry recovered judgment against Lovell before B. More, a justice of the peace for Washington county, on the 26th of August, 1801. Lovell obtained a *supersedeas* under the Act of Assembly of Maryland, until the 26th of February, 1802, and in the mean time removed to Alexandria county. When the *supersedeas* had expired, the plaintiff obtained a new warrant from a justice of the peace in Alexandria county, and recovered judgment and took out execution there which was not satisfied, Lovell having removed back to this county. The plaintiff then took out the present execution on the *supersedeas* here. Rule discharged.

CIRCUIT COURT OF THE UNITED STATES.

APRIL TERM, 1802, AT ALEXANDRIA.

UNITED STATES *v.* PETER VEITCH.

A *capias* is the proper process upon an indictment for misdemeanor, found after service of a summons to show cause why an indictment or information should not be filed.

INDICTMENT for retailing spirituous liquors. The first process was a summons to show cause why an information or an indictment should not be filed. Upon this summons the defendant did not appear, and his default was recorded. The indictment was found at July term, 1801, and a *capias* issued returnable to October term, 1801.

Mr. Simms, for defendant, contended that a *capias* was not the legal process.

The COURT stopped him from arguing the point, saying it had been decided several times in this Court, and a general direction had been given to the Attorney for the United States to issue a *capias* upon every indictment found after a summons had issued and been served to show cause why an indictment or information should not be filed; being of opinion that a *capias* was the proper process. Virginia Laws, Rev. Co. 112, § 28.

UNITED STATES *v.* ROBERT GORDON.

Under the Act of Virginia prohibiting the sale of spirituous liquors without license, all the acts of selling before conviction constitute but one offence.

INDICTMENT for retailing spirituous liquors. The judgment was arrested; because the indictment charged it as a second offence, before the defendant was convicted of a first; the COURT being of opinion that all selling before conviction constituted but one offence.

COMMONWEALTH OF VIRGINIA v. DANIEL DULANY.

A prosecutor liable for costs upon an indictment for a misdemeanor, has no right to withdraw the prosecution without the consent of the Attorney for the United States.

INDICTMENT for assault and battery on J. D. Westcott. I. V. Thomas's name was indorsed as prosecutor and liable for costs.

Mr. Jones, for defendant, stated that Westcott was satisfied and wished, with the consent of Thomas, that the defendant might be allowed to confess judgment for costs only.

Mr. Mason, Attorney for the United States, objected on the ground that it was a prosecution in the name of the Commonwealth, and no private prosecutor could compound, or interfere in the business.

The COURT decided that the prosecutor had no right to withdraw the prosecution, and refused to permit it to be done without the consent of the Attorney for the United States.

UNITED STATES v. JOHN HARE.

Upon a trial for larceny, the owner of the stolen goods is a competent witness in chief, upon filing with the clerk of the Court, for the use of the prisoner, a release of the witness's right to one half of the fine which the Court might impose.

INDICTMENT for stealing a pocketbook and money from Anthony Conrad. This indictment was under the Act of Congress of April 30, 1790, sec. 16, [1 Stat. at Large, 112,] which imposes a fine of fourfold the value of the goods stolen, and gives one half of that fine to the owner of the goods.

Mr. Mason, Attorney for the United States, offered Conrad, the owner of the goods as a witness, and produced a release from Conrad to the prisoner of the half of the fine which might be imposed.

Mr. Jones, for the prisoner, objected, that the release cannot operate to convey a mere right to an uncertain future, contingent possibility. Besides, it is not delivered to the prisoner, he will not accept it.

The COURT ordered the witness to be sworn, on his delivering the release to the clerk and filing it in the cause.

CRANCH, J., doubted.

UNITED STATES v. MARY RAWLINSON.

The name of a prosecutor must be indorsed on an indictment for keeping a bawdy-house.

INDICTMENT for keeping a bawdy-house. It was questioned by the Attorney for the United States, whether the name of Asa Hill, being a voluntary witness to the grand jury, ought not to be written at the foot of the indictment as a prosecutor, before it should be sent up to the grand jury.

The COURT were of opinion that his name ought to be so written, but gave no direction.

 COMMONWEALTH OF VIRGINIA v. EAKIN.

An information at the suit of the Commonwealth of Virginia may be discontinued before appearance of the defendant.

INFORMATION for retailing spirituous liquors. In September, 1799, the presentment was made in the Court of Hustings, and summons issued to show cause why an information should not be filed, returnable to December, 1799. In July, 1800, the defendant being called, failed to appear, and his default was recorded, and the Court ordered an information to be filed. In September, 1800, the information was filed, and a summons served on the defendant to answer it. At January term, 1802, the causes depending in that court having been by law transferred to this Court, the defendant being called, failed to appear, and a *capias* was ordered returnable to this term, upon which the defendant was taken and recognized to appear. No process appears to have issued, and no proceedings had after September, 1800, until January, 1802. It was urged, for the defendant, that there had been a discontinuance.

Mr. Mason, for the Commonwealth. The United States are always in court. In Virginia no cause can be discontinued. Rev. Co. 90. A summons was served on the defendant to show cause why an information should not be filed. He was in court by virtue of that summons.

The COURT decided that the case had been discontinued, notwithstanding the Act of Virginia, p. 90, and ordered the *capias* to be quashed.

KILTY, C. J., *contra*.

Several other cases were dismissed on the same ground.

UNITED STATES v. McKNIGHT.

Judgment entered by mistake of the clerk, may be set aside at the next term, and the execution quashed.

INDICTMENT for gaming. The Court at last term had ordered this and the other gaming cases, (of which there were about forty on the docket depending on the same question of law) to stand over and be continued to this term for further argument ; but the clerk, by mistake, had entered judgments upon the verdicts, and issued executions.

Mr. Simms, for the defendant, moved the court to set aside the judgments and quash the executions ; and cited *Fox v. Glass*, 2 Str. 823, and 2 W. Black. Rep. 943, 1097.

The COURT assented to the motion ; the error being a mistake of the clerk.

 CRAIG v. RICHARDS.

A *subpœna duces tecum* will not be ordered to the clerk of a court in Virginia, to bring here original papers filed in his court.

ASSUMPSIT for money had and received.

The defendant was indorser of Robert Alexander's note. Suit had been brought against Alexander in the Dumfries District Court in Virginia, and execution returned *nulla bona*.

Mr. Swann testified that he was counsel for the plaintiff in that suit, and that the original note was by him filed in that cause in the District Court at Dumfries. That he was well acquainted with the handwriting of the defendant, and that the indorsement of that note appeared to him to be in the defendant's handwriting.

Mr. E. J. Lee, for the defendant, contended that a *subpœna duces tecum* might issue to the clerk of the Dumfries District Court to bring in the note.

But the COURT, being inclined to think that they could not compel the clerk to bring his records out of Virginia, refused to instruct the jury that it was necessary for the plaintiff to produce the original note.

Bill of exceptions taken, but no writ of error was prosecuted.

Dade v. Herbert.

BROWN v. TONKIN.

A stamp is not necessary to an acknowledgment of having hired a house.

DEBT, for rent.

An acknowledgment, signed by the defendant, that he had hired the house for six months, at \$100 per annum, payable quarterly, was offered in evidence.

Mr. Peacock, for the defendant, objected because the paper was not stamped.

The COURT adjudged the stamp to be unnecessary.

KIRKPATRICK'S EXECUTOR v. LANGPHIER.

The obligee's indorsement of a payment upon a bond is not evidence to rebut the presumption of payment, unless made with the privity of the obligor.

DEBT, on bond payable in 1775.

The defendant relied on the length of time to prove payment.

The suit was brought in April, 1801. The plaintiff relies on an indorsement, dated December, 1781, in the handwriting of the testator, (who died in 1784) in these words, "Rec'd, 20 Dec. 1781, your account for work done, sixty shillings, T. K." The plaintiff also contended that five years during the war were to be deducted from the limiting time.

The COURT directed the jury that they may presume payment, and ought to presume it, if they should not be satisfied that the indorsement was made with the privity of the defendant.

Verdict for defendant.

DADE v. HERBERT.

A release from the assignee of a chose in action is a bar to an action by the assignor for the same cause of action.

ACTION OF ASSUMPSIT, upon a promise in writing, not under seal, to convey lands. After the suit brought, Dade assigned his right of action to Flannery, and empowered him to receive the money, and to apply to his own use as much of it as would satisfy a debt due by Dade to Flannery. This assignment and power were not stamped, and therefore could not be given in evidence as a power of attorney.

 Alexander v. Turner.

Mr. Swann, for the defendant, having had leave to plead specially, pleaded this assignment and a release from Flannery to the defendant.

Mr. Youngs, for the plaintiff, objected to the filing of this plea at this stage of the cause, there having been an office judgment. But it appearing that the plaintiff had, by leave of the court, amended his declaration since the office judgment, the Court received the plea. *Loft's Gilbert*, L. E. 403; *Buller*, N. P. 150, 151.

The plaintiff prayed oyer, and demurred generally.

Mr. Youngs, for plaintiff. The assignment conveys only a right to such part of the sum as was sufficient to satisfy Flannery's claim. It did not authorize him to release or to dismiss the action. A chose in action is not assignable at law. The question is whether this assignment gave Flannery a right at law to release the debt.

Mr. Swann, for defendant. The operative words of this assignment purport to convey the whole right of action, and they are not controlled by the subsequent expressions contained in the power of attorney. But the assignee of an open account, if the debtor assumes to pay to the assignee, may recover in his own name; *Mouldsdales v. Burchall*, 2 W. Bl. 820; the assignment being a good consideration of such assumpsit. *Fenner v. Meares*, 2 W. Bl. 1269. If Herbert had assumed to pay the money to Flannery, he might have supported an action in his own name. But here he not only assumed to pay, but actually did pay. If Flannery had a right to recover in his own name, he had a right to give a release upon payment of the money.

The COURT overruled the demurrer.

ALEXANDER v. TURNER, Bailiff of Patten.

An acceptance by the tenant of a bill drawn by the landlord for the rent, is no bar to a distress, if the bill be not paid.

REPLEVIN. Cognizance, as bailiff, for rent arrear. Plea, "no rent arrear," and issue.

Mr. Taylor, for plaintiff, moved for leave to withdraw the plea of "no rent arrear," and file a new plea setting forth that Patten had drawn an order on the plaintiff, for three quarters' rent, which the plaintiff had accepted to pay; and that, as to the fourth quarter's rent, he tendered it before the distress was made.

The COURT refused the motion.

Rhodes v. Rigg.

The cause was then tried on the issue joined, and the Court instructed the jury that the acceptance did not destroy the debt due for the rent, and that it was no bar unless it had been paid.

FENDALL v. PETER BILLY.

Upon the plea of "no rent arrear," the tenant may give evidence of work done and goods sold and delivered to the landlord, without notice of set-off.

The party's own books of account are not evidence in his favor, although in the handwriting of a deceased clerk, unless they contain the first entry of the charges.

COVENANT to pay rent.

On the plea of no rent arrear, *Mr. Jones*, for the defendant, offered evidence of work done, and trees sold to the plaintiff.

Mr. E. J. Lee, for the plaintiff, objected to the evidence, because there had not been notice given of a set-off.

The COURT allowed the evidence to go the jury, on the equity of the Act of Virginia; Revised Code, 40; and on the practice of the State of Virginia.

The plaintiff offered his ledger to prove counter charges against the defendant, the entries were in the handwriting of his clerk, who was dead.

Mr. Jones, for the defendant, objected, and cited *Esp. Reports*.

The COURT refused to let the ledger go in evidence to the jury, it not being proved that the entries therein were the first entries. The journal also was refused for the same reason.

RIDGWAY v. GHEQUIER.

A record of a former judgment between the same parties, upon the same cause of action, may be given in evidence on *non assumpsit*.

ASSUMPSIT, *non assumpsit*, and issue.

The COURT permitted the defendant to give in evidence, on the general issue, the record of a former judgment between the same parties on the same cause of action.

KILTY, C. J., doubting.

WILLIAM RHODES v. JOHN RIGG.

An instrument can be proved by the subscribing witness only, unless, &c.

DEBT on bond, payment, non-payment, and issue.

Alexander v. West's Executrix.

The defendant offered an account in set-off.

The plaintiff produced the defendant's receipt, to which George Rhodes was a subscribing witness.

The defendant objected to its being admitted in evidence unless proved by the subscribing witness, George Rhodes.

The plaintiff made affidavit that the witness had removed from Alexandria about two years ago, and has not returned since; that he does not know where he now is, but has understood that he has been at work on the shore of the Chesapeake Bay; but on what part he knows not, nor does he know that he is within one hundred miles of this place.

The COURT were of opinion that this affidavit was not sufficient to justify the admission of other evidence of the handwriting of the defendant, nor to dispense with the testimony of the subscribing witness.

The plaintiff suffered a nonsuit, but the Court reinstated the cause on payment of costs.

RIDGWAY v. PANCOST.

If two separate causes of action, amounting together to more than twenty dollars, be joined in one declaration, this Court has jurisdiction, although neither amounts to twenty dollars.

The plaintiff may maintain the action, although discharged as an insolvent debtor, under the law of Virginia, since the cause of action accrued.

DEBT, on two promissory notes; one for twelve dollars, and the other for twenty dollars.

Mr Swann, for the defendant, objected that neither of the notes was large enough to support the jurisdiction of the Court.

But the COURT overruled the objection.

He objected also that the plaintiff had been discharged as an insolvent debtor under the law of Virginia, since the cause of action accrued, whereby all his rights became vested in the sheriff.

Sed non allocatur. Both points were decided without argument.

ALEXANDER v. WEST'S EXECUTRIX.

An office judgment may be set aside on the plea of "never executrix."

THE plea of "never executrix" was admitted to set aside an office judgment.

MARSHALL, J., said he agreed, as this was a new case, but he should not agree again to admit such a plea to set aside an office

Davy v. Faw.

judgment after the first term, but upon affidavit that it was not intended for delay.

Ex parte TUCKER.

Upon application for naturalization a deposition in 1802, that the deponents have known the applicant "since the year 1793, in New York," is not evidence that he was residing in the United States before the 29th of January, 1795.

JOHN TUCKER, a native of the Island of Bermuda, applied to be admitted a citizen of the United States, under the law of April 14th, 1802. A deposition of Governeur and Kemble, taken before a notary-public, stating that they have known him "since the year 1793, in New York, and that he was a supercargo in their employ in the year 1795, and continued till 1798."

The application was made under the clause authorizing persons resident in the United States before the 29th of January, 1795, to become citizens on proof of two years residence, &c.

The COURT were unanimously of opinion that the affidavit was not sufficient.

GENERAL RULE:

No SUBPENA for attachment in Chancery shall issue before bill filed.

DAVY v. FAW.

When the terms of submission to arbitration are uncertain, parol evidence may be given of the controversies submitted.

DEBT on award. The terms of submission were "of a controversy of several accounts and contracts existing between us."

The COURT, allowed parol evidence to show what were the accounts and contracts meant in the submission, and stopped *Mr. C. Lee* who had offered such evidence, and informed him that in the case of *Ellzey v. Mosorop*, in Washington, they had decided that where the terms of submission were uncertain, parol evidence might be given of the controversies submitted.

MARSHALL, J., absent.

McIVER, Assignee of Dick, v. Moore.

HOOE & HARRISON v. CORPORATION OF ALEXANDRIA.

In an action upon the case against a corporation aggregate for injury done by their agent, it is not necessary to prove that the agent had authority under the corporate seal — nor under an order entered on the books of the corporation.

ACTION ON THE CASE for filling up and raising the street, so as to obstruct the doors and windows of the plaintiffs' warehouse.

The plaintiffs produced Mr. Faw, a witness to prove that he was appointed street commissioner by the corporation, and that he had orders from them to raise and pave the street.

Mr. C. Lee, for the defendants, objected to parol evidence of those facts, and contended that the plaintiffs ought to produce an authority to Mr. Faw, under the corporate seal, or by an order entered on the books of the corporation.

But the COURT overruled the objection.

CRANCH, J., said that it could not be presumed that evidence of that kind was in the power of the plaintiffs; and that the jury might presume a power under seal from the facts proved.

BENNET & WATTS v. ALEXANDER, special Bail of CHARLES LOVE.

A discharge of the principal under a commission of bankruptcy issued after the return of the *sci. fa.* against the bail is no discharge of the bail.

SCIRE FACIAS, returnable October 18th, 1801.

Mr. Youngs, for the defendant, after pleading "payment," and "no such record," moved for leave to plead the discharge of Charles Love, the principal, under the Bankrupt Law. The discharge was dated in December, 1801. The commission of bankruptcy issued October 20th, 1801.

But the COURT refused to admit the plea, being of opinion it was no bar.

McIVER, Assignee of E. C. DICK, v. MOORE.

The Act of Limitations can not be given in evidence upon *nil debet*. The plaintiff being assignee of a bankrupt, must produce the commission and proceedings and deed of assignment. Upon reinstatement of the cause after nonsuit, the Court will not permit the defendant to plead limitation, unless on affidavit showing it to be necessary for the justice of the case.

DEBT on an accepted order. *Nil debet* and issue.

Mr. E. J. Lee, for the defendant, prayed the Court to instruct the jury that the acceptance of the order not being dated, and

Hartshorne & Sons v. Ingle.

the order being dated September 24th, 1794, and no proof being given of the date of the acceptance, they ought to presume that the acceptance was on the day of the date of the order, and therefore barred by the act of limitations; the writ not being issued until the 5th of September, 1801.

CRANCH, J., inquired whether the act of limitations was pleaded.

Mr. E. J. Lee contended that it might be given in evidence on the issue of *nil debet*, and cited Esp. N. P. 262.

The COURT said they had decided at last term in Washington, in the case of *Gardner v. Lindo*, [ante 78,] (see that case in the Supreme Court of the United States, 1 Cra. Rep. 343,) that the statute of limitations could not be given in evidence on the plea of *nil debet* to an action of debt on a promissory note; and refused to overrule that decision, it having been made unanimously by a full Court; and the Court being now not full. MARSHALL, J., absent.

Upon the motion of Mr. E. J. Lee, for the defendant, the Court instructed the jury that the plaintiff must prove himself to be duly appointed assignee, by producing the original commission, and proceedings thereon, or a certified copy thereof, and the original deed of assignment.

The plaintiff became nonsuit, and the Court, on his motion, reinstated the cause without costs, and refused the defendant leave to plead the statute of limitations, unless he could show by affidavits that the plea was necessary to the justice of the case.

 THOMAS v. JAMESSON.

A slave cannot be a witness if a free white man be a party.

ASSAULT AND BATTERY. The plaintiff was a man of color. The defendant, a free white man, offered his slave as a witness under the Act of Assembly, Rev. Code, 289, § 3; Old Acts of Assembly, p. 284. *

The COURT refused to permit the slave to be sworn. See the Act of 1801, January 21st, § 4.

 HARTSHORNE & SONS v. INGLE.

Variance between the *capias* and declaration cannot be pleaded to set aside an office judgment.

THE declaration was in debt upon an award. The *capias* was

 Alexander v. Thomas.

in case. There had been an office judgment and writ of inquiry; to set aside which, *Mr. E. J. Lee*, for the defendant, offered to plead a variance between the writ and declaration, in abatement. But the COURT refused.

 WISE v. GEIGER.

An award may be good in part and void in part.

DEBT on an Award. *Mr. C. Lee*, for the defendant, objected that the award was not complete, in this that it does not ascertain how the outstanding debts due to the partnership shall be valued, it says only that they shall be divided equally, value and value alike. Kyd on Awards, 83, 88.

Mr. Simms, for the plaintiff. An award may be good for part, and void for part. Independent of the provisions respecting those debts, they have awarded the sum of four hundred dollars to be due by the defendant to the plaintiff; and for this sum the action is brought. 1 Bac. Ab. 142; *Fox v. Smith*, 2 Wilson, 293; *Addison v. Gray*, 2 Wilson, 293; *Wills v. Maccarmick*, 2 Wils. 248.

The COURT were of opinion that the award was good as to the part upon which the suit was brought, it being an independent matter.

 DADE v. MANDEVILLE.

The summary remedy given in Virginia by a motion against a co-surety is confined to the court which rendered the original judgment.

MOTION by Dade for judgment against Mandeville, as joint surety with Dade for Brown & Co. Judgment had been rendered against Dade in the Fairfax County Court.

Mr. Simms, for the defendant, contended that the summary remedy by one surety against another, was confined to the court who gave the original judgment. Rev. Co. 292, 337.

The COURT so decided.

 ALEXANDER v. THOMAS.

The marshal's commission of five per cent. may be included in a replevin bond for rent.

MOTION for judgment given on a replevin bond for goods distrained for rent.

Alexander v. Thomas.

Mr. Taylor, for the defendant, objected that the bond included the marshal's commission of five per cent.

But the COURT were of opinion that the commission ought to be so included. Act of Assembly, Rev. Co. 228, 338; Act of 1800, p. 10.

NOTE. CRANCH, J., was absent from the District during the June and July terms, 1802.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1802, AT ALEXANDRIA.

UNITED STATES *v.* BETTY BELL *alias* MULLICAN, a free Mulatto.

A slave may be a witness on a prosecution against a free mulatto, in Alexandria county.

INDICTMENT for stealing. Slaves were permitted to be sworn on the part of the United States against the prisoner. Old Acts of Virginia, 348; Rev. Co. 199, 200; Act of 1801, Jan. 21, § 4.

UNITED STATES *v.* WILLIAM LAWRENCE.

Assault and battery by a seaman upon the master of a vessel, does not amount to a confinement of the commander, nor an attempt to excite a revolt within the Act of Congress.

INDICTMENT for assaulting and beating the master of the brig Neptune, (G. Colman,) at sea, and attempting to excite a revolt. See the Act of Congress of April 30, 1790, c. 9, § 12. [1 Stat. at Large, 112.]

Mr. Jones, for the defendant, moved the Court to instruct the jury that proof of a mere assault and battery, committed at sea by a seaman upon his commander, does not amount to a confinement of the commander, nor to an attempt to excite a revolt, within the Act of Congress, which instruction was given by KILTY, C. J., and CRANCH, J.

MARSHALL, J., thinking the question did not apply to the case, refused to give an opinion.

UNITED STATES *v.* BARLOW.

On a trial for larceny, of the goods of T. Lee, evidence that the goods were the property of a deceased person in the possession and management of T. Lee, will support the indictment.

The jury must believe or reject the whole of the prisoner's confession. But the offer of a bribe by the prisoner to the officer, to permit him to escape, is evidence independent of the confession.

INDICTMENT for stealing a horse, the property of Col. Thomas

Lee. It was objected, on the trial, that the property was not in Thomas Lee, but belonged to the estate of Calvin Washington, deceased. But it being proved that Thomas Lee had the possession and management of that estate,

The COURT held that the property was well laid, and proved as laid. The confession of the prisoner being given in evidence, the Court instructed the jury that they must believe or reject the whole. CRANCH, J., doubted.

In the same conversation, the prisoner offered the witness a watch, and a deed of his house, if he would suffer him to escape.

The COURT instructed the jury that this offer of the watch and deed was a separate fact, not depending on the confession before alluded to, and therefore good evidence by itself. KILTY, C. J., doubting.

RIDDLE & CO. v. MANDEVILLE & JAMESSON.

An action for money had and received, can be maintained in Virginia, by an indorsee against a remote indorser of a negotiable promissory note.

A sale of an indorsed negotiable note, for flour, and a sale of the flour for an amount, in cash, less than the value of the note after deducting the discount for the time it had to run, is not usurious.

ASSUMPSIT for money had and received. The evidence was a note made by Vincent Gray, March, 2d, 1798, to Mandeville & Jamesson, or order; by them indorsed to James McClenachan, and by him to the plaintiffs; and the record of a suit by the plaintiffs against Gray, the maker of the note, prosecuted to judgment, execution, and insolvency.

It was contended, by the defendants, 1st, That an action will not lie by an indorsee against a remote indorser of a promissory note. 2d. That the plaintiff cannot recover on this count; and 3d. That the note was usurious.

1. On the first point, the cases cited, were, *McWilliams v. Smith*, 1 Call, 123; *Swallowwood v. Vernon*, 1 Str. 479; *Grant v. Vaughan*, 3 Burr. 1516; *Ward v. Evans*, 2 Ld. Raym. 928, and the case of *Lee v. Love*, 1 Call, 497.

The COURT was of opinion that the action will lie. (See the case of *Dunlop v. Silver et al. ante*, p. 27.) MARSHALL, J., *contra*.

2. The plaintiff cannot recover on the simple count for money had and received. Because it tends to surprise the defendant. *Wood v. Carris*, Ex'or, 1 Call, 232. But this objection was unanimously overruled by the Court.

3. The evidence relied on to prove the usury, was that the note with the indorsement of the defendants and McClenachan was

Riddle v. The Marshal of the District of Columbia.

put into the hands of Simms, a broker, to raise money upon. With the note, which was for \$1500 at 60 days, Simms purchased flour from Scott which he sold for \$1200 cash, and paid it to McClenachan.

The COURT refused unanimously to instruct the jury that the transaction was usurious.

A bill of exceptions was taken on the two first points, and the judgment reversed in the Supreme Court of the United States. See 1 Cranch, Rep. 290.

BROOKE v. PEYTON.

Comparison of handwriting is evidence to prove the publication of a libel.

CASE, for a libel. *Mr. Jones*, for the defendant, prayed the Court to instruct the jury that evidence by comparison of hands, is not sufficient to prove the publication.

The COURT unanimously refused to give the instruction.

Bill of exceptions taken. Verdict for the plaintiff \$525 damages. But the defendant did not prosecute a writ of error.

BOND'S EXECUTORS v. GRACE'S EXECUTORS.

Judgment for sterling money. Difference between English and Irish sterling.

NOTE in sterling money, dated in Ireland. The declaration is for sterling money.

The COURT, under the Act of Assembly of Virginia, authorizing them to settle the rate of exchange, at April term last, examined witnesses to prove the rate of exchange between Ireland and England. Irish is turned into English sterling by deducting one-thirteenth of the Irish, and English is turned into Irish by adding one-twelfth of the English. See the record of April term, 1802, in the case of *Mahon v. Grace's Executors*.

JOSHUA RIDDLE v. THE MARSHAL OF THE DISTRICT OF COLUMBIA.

A. fi. fa. first delivered to the marshal, will supersede a *fi. fa.* delivered to a constable subsequently, but first levied.

A JUSTICE of the peace for Alexandria county issued a *fi. fa.* on the 30th of September, 1801, in the case of *Riddle v. Kell*, for

\$19.44, and 58 cents costs, which was delivered to Abercrombie, a constable, on the 11th of March, 1802. On the 3d of March, 1802, a *fi. fa.* was issued from the clerk's office of Alexandria county, against Kell, at the suit of the United States for a fine or forfeiture, and came to the hands of the marshal on the 9th of March, 1802, who afterwards levied it on the goods in the hands of the constable taken on the justice's *fi. fa.*

Mr. Taylor, for Riddle, moved the Court to quash the service of the *fi. fa.* of the *United States v. Kell*, and for a rule on the marshal to return the goods to the constable, on the ground of their being in the custody of the law, and cited 10 Vin. Ab. 561. Goods in execution, though wrongfully, being once seized and in custody of the law, cannot be seized again by the same or any other sheriff, and if they are sold thereon, such bargain is void. Per *HOLT*, C. J., *Bachurst v. Clinkard*, 1 Show. 174.

KILTY, C. J., was for granting the motion. *MARSHALL*, J., for discharging the rule, because there did not appear to be any means of quashing the justice's execution. *CRANCH*, J., for discharging the rule because the justice's warrant did not appear to be regular; and if Riddle has been injured, he may bring his action. Rule discharged.

—◆—
THOMAS HAMILTON v. JAMES RUSSELL.

Possession of the goods by a witness, does not create such an interest in the witness as to render his testimony inadmissible in favor of the party under whom he holds the possession.

TRESPASS for ordering an execution to be served on the plaintiff's goods, at the suit of the defendant, against James and Robert Hamilton. The goods had been taken in the possession of Robert, and the defendant alleged that the deed of conveyance under which the plaintiff claims, was fraudulent as to the creditors.

The plaintiff offered Robert Hamilton as a witness. The defendant objected that he was interested, because, if the plaintiff recovered, Robert would still remain in the possession and use of the goods by permission of his brother, (the plaintiff,) as he had done heretofore.

But the COURT were unanimously of opinion that the possession, or the probability that his brother would suffer him to remain in possession, was not such an interest as affected his competency, but went only to his credibility. (See the other points of this case in the report of it in the Supreme Court of the United States, 1 Cranch, Rep. 309, where the judgment of this court was affirmed.)

HOOE & HARRISON v. The Mayor and Commonalty of Alexandria.

HOOE & HARRISON v. THE MAYOR AND COMMONALTY OF ALEXANDRIA.

A person who has right to do an act, has a right to the necessary means ; and if, in the use of such means, a damage be sustained by another, the former is not liable. The principal is liable for the conduct of his agent while acting in his employment, although he act without or contrary to his order. Full costs are allowed upon a verdict of one cent damages in an action upon the case for damages occasioned by raising the level of the street.

ACTION ON THE CASE for filling up the street so as to shut up the windows and doors of the plaintiffs' warehouses.

Mr. Simms and *Mr. Swann*, for the plaintiffs, moved the Court to instruct the jury, "that if it shall be their opinion that Faw was street commissioner for the corporation of Alexandria at the time when the injury was done, and was then in the actual employment of the corporation, then the corporation are liable for his conduct while in their actual employment as aforesaid, although in the execution of the said employment he should go beyond their express orders," and that if, in raising the street, any damage accrued to the plaintiffs, they were entitled to recover in this action. *Leader v. Moxton*, 3 Wils. 461 ; *Meredith's case*, 4 T. R. 794.

KILTY, C. J., delivered the opinion of the Court. 1. The corporation have by law a right to pave the streets, and of course to raise or lower particular parts of any street, if such raising or lowering should be necessary for performing the work in a reasonable and proper manner ; and the individuals who may be injured by it, have no right of action for such injury, unless expressly given by Act of Assembly. But, if a wanton and unnecessary injury is done, an action may be sustained. 2. The corporation, if liable at all, are answerable for the conduct of their commissioner if he was acting under their authority, and was engaged in the work in which they employed him, when the injury, if any, was done, although he may have acted without their orders, or contrary to them. But if he committed an injury unconnected with the business in which he was employed, his being in the employ of the corporation will not make them liable. The jury having found a verdict for one cent damages, a question was made whether that would carry the costs in an action upon the case for injury done by raising the level of the street. The authorities cited were, the Virginia Rev. Code, p. 116, sec. 17, and the English statutes of 22 and 23 Car. 2, and 8 and 9 W. and M.

Mr. Simms, for the plaintiffs. The Act of Assembly has copied the English statutes, and the decisions in Virginia have been similar to those in England, and have confined the meaning of the Act

to actions of trespass, *quare clausum fregit*, although the words of the statutes, and of the Act, are, "and all other actions personal."

The COURT allowed full costs.

SMITH v. CAROLIN.

If there be a subscribing witness to an instrument, evidence of the confession of the defendant will not dispense with the testimony of the subscribing witness.

DEBT on a promissory note. *Mr. Jones*, for the plaintiff, produced a note having a subscribing witness who was not present in court, and offered to prove that the defendant acknowledged the note to be his.

Mr. Youngs, for the defendant, objected, and cited *Esp. N. P.* 256, 781.

The COURT refused to admit the testimony, on the general ground that the non-production of the subscribing witness induces a suspicion that if produced, he would testify something to the defendant's advantage. *Peake*, L. E. 7, 64, 65, 66. *KILTY*, C. J., *contrà*.

The plaintiff became nonsuit.

KILLINGLY *et al.* v. TAYLOR.

The jury may, or may not allow interest upon the balance of an account.

The COURT instructed the jury that if they were satisfied that the balance of the account was due as stated, they might allow interest or not as they should judge proper, considering what was the general usage on that subject.

SMITH v. HEISKELL.

Franklin stoves fixed, in the usual manner with bricks and mortar, pass to the vendee of the house.

TROVER for Franklin stoves fixed in the fireplaces of the house which the defendant purchased of the plaintiff. They were fixed in the usual manner with bricks and mortar. The jury found that when the plaintiff sold the house to the defendant, he expected to

 Brocket v. Johns.

be paid for the stoves in addition to the price of the house. The cases cited were, *Lawton v. Lawton*, 3 Atk. 13; 2 Bac. Ab. 420, Gwillim's edition.

Judgment for the defendant, it being a case between vendor and vendee.

 HARPER & LYLES v. REILY.

The declarations of a witness not under oath, may be given in evidence to discredit his testimony.

TROVER for two hogshheads of sugar. The defendant moved for the continuance of the cause to the next term on account of the absence of a witness. The affidavit stated that the witness would prove a conversation between himself and Gilpin, a witness who it was supposed would be produced on the part of the plaintiff.

The COURT refused a continuance, because the testimony of the defendant's witness would not be competent, on the principle that the declarations of a witness not under oath, shall not be adduced against the witness' declarations on oath. *Quære*. See Peake, L. E. 84, 85, and 3 Burr. 1244.

On motion, the Court granted a new trial.

 BROCKET v. JOHNS.

Under the statute of Virginia, goods not upon the premises, may be attached to secure rent not due.

ATTACHMENT to secure rent not due, was levied on goods not upon the demised premises.

Mr. Youngs moved to quash the attachment, contending that the law only meant to give the same remedy before as after the rent became due, and that nothing could be attached unless on the premises.

But the COURT overruled the motion to quash. The act does not confine the attachment to goods on the premises. The object of the law is to compel the tenant to give security for his rent, and it is of no importance what property is seized to produce that effect. KILTY, C. J., *contrà*.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1802, AT WASHINGTON.

CONNINGHAM v. LACEY.

Bail residing in Alexandria county, cannot be received in an action in Washington county.

BAIL was refused who lived in Alexandria; the COURT being doubtful whether an execution from this county can be served in that. KILTY, C. J., absent.

PENNINGTON v. THORNTON, special Bail of Blodget; PENNINGTON v. STICKNEY, special Bail of Blodget.

Where two become bail jointly and severally, and two writs of *scire facias* are issued, and one of the bail surrenders the principal, he must pay the costs upon both writs of *scire facias*.

SCIRE FACIAS. The bail offered to surrender the principal.

Thornton and Stickney jointly and severally recognized as bail for Blodget. The writ against Thornton was returned "*scire feci*." That against Stickney, "*nihil*."

The COURT refused to receive the surrender without payment of the costs on both writs of *scire facias*, it being stated by *Mr. Mason* and *Mr. Gantt* that such was the practice in Maryland.

The Court, however, doubted the propriety of the practice, where several writs of *scire facias* were issued.

KILTY, C. J., absent.

UNITED STATES v. VOSS.

Upon an indictment for retailing spirituous liquors, the informer is not entitled to half of the penalty, and is a competent witness.
The selling by the servant is the selling by the master.

INDICTMENT for retailing spirituous liquors. The defendant objected to the witness because, being the informer, he is entitled

Lovejoy v. Wilson.

to half the penalty under the Act of Congress concerning the District of Columbia.

Mr. Mason, for the United States. It does not appear that he is the informer, and by the laws of Maryland on which this indictment is founded, no part of the penalty accrued to the informer.

The COURT overruled the objection.

Mr. Hewitt, for the defendant, prayed the Court to instruct the jury that the selling by the young man, was not the selling by his master; the master not being answerable criminally for his acts.

Instruction refused. The Court referred to the case of the *United States v. Paxton*, at December term, 1801, [*ante*, 44,] and *United States v. Shuck*, at January term, 1802, [*ante*, 56.]

UNITED STATES v. CONNER.

Upon an indictment for keeping a gaming-table in a booth upon a race-field, contrary to the Act of Maryland, it is not necessary to prove that the traverser was the owner. He is equally guilty, whether he acted as principal, or agent, or servant of the owner.

INDICTMENT for keeping a gaming-table, to game with dice, at a booth, on the race-field, contrary to an Act of Assembly of Maryland.

The COURT instructed the jury that it was not necessary for the United States to prove that the traverser was the owner of the table, if he played at it as owner, and appeared to be the person who set it up. And that it was of no importance whether the traverser acted as principal or as agent or servant for the owner of the table. In each case he was equally guilty.

(*Quære*. See the last case and the cases there referred to.)

LOVEJOY v. WILSON.

In assumpsit for goods sold and delivered, the defendant may prove a partnership between the plaintiff and the witness by the witness.

In a count "for sundry matters properly chargeable in account," if no account be annexed, the words which refer to an account as annexed, may be rejected; and money lent may be given in evidence upon that count.

ASSUMPSIT, for stone and sand sold and delivered. The defendant produced Owen McGlue as a witness to prove a partnership between the witness and the plaintiff, and that this was a joint contract.

Mr. Gantt, for the plaintiff, objected that the witness was interested.

The COURT decided that he was a competent witness to prove

Edmondson v. Lovell.

the partnership; but should not be compelled to give evidence of payments made by the defendant during the partnership. (*Quære.*)

One of the counts, in the case was *indebitatus assumpsit*, "for sundry matters properly chargeable in account as by a particular account thereof, herewith into court brought, may more fully appear." No account was filed. The plaintiff offered evidence of money lent. The defendant objected that it could not be given on that count.

KILTY, C. J., was of opinion that the evidence was applicable to that count. No account being filed, the words "as by a particular account," &c., must be rejected as surplusage, and then the count will stand as a general *indebitatus assumpsit* "for sundry matters chargeable in account;" and money lent is a matter chargeable in account.

MARSHALL, J., and CRANCH, J., did not object.
(*Quære* as to this point.)

UNITED STATES v. LOUDER.

This Court has no jurisdiction to try a slave for larceny, but will quash the indictment and send him to a justice of the peace to be tried. By consent of parties the Court will try the issue, whether slave or not.

INDICTMENT for stealing. The prisoner pleaded *ore tenus* that he is a slave of S. B. Balch, and concluded to the jurisdiction of this Court. 2 Hawk. 227. The United States joined issue upon that plea.

The Attorney for the United States, and the counsel for the prisoner agreed that the Court should try the issue, fact as well as law. Whereupon the Court examined witnesses, and being satisfied that the prisoner was a slave, ordered him to be delivered to a constable to be carried before a justice of the peace and tried; and the indictment to be quashed, this Court not having jurisdiction.

NINIAN EDMONDSON v. LOVELL.

The execution of a deed of land need not be proved by the witnesses if it be acknowledged and recorded.
Possession alone will maintain trespass *quare clausum fregit* against one who has no title.

TRESPASS *quare clausum fregit*. The Court decided that the execution of a deed of bargain and sale of land need not be proved, by subscribing witnesses if the deed has been duly ac-

United States v. Wilson.

knowledge and recorded. And that possession alone was sufficient to maintain the action against one who has no title.

VOSS v. BAKER.

In trespass for breaking up a scow, if the defendant, knowing that a third person had committed the trespass, received from him the timbers and planks, knowing them to be the property of the plaintiff, he is guilty of the trespass. *Quære.*

TRESPASS for breaking up a scow. The Court instructed the jury that if the defendant, knowing that Tuel committed a trespass in taking and breaking up a scow of the plaintiff, received from Tuel the timbers and planks of the scow, knowing them to be the property of the plaintiff, which had been so taken, he is answerable in this action, being equally as guilty as Tuel.

MARSHALL, J., absent.

(This opinion was grounded upon the principle that in trespass there are no accessories; and that in a case where a person would be an accessory in felony, he will be a principal in trespass.)

Mr. Woodward, for the defendant, moved the Court to instruct the jury, that if they should be of opinion that the defendant did not receive the plank, &c., till after the action brought, he could not be liable in this suit, although the principal trespass was committed before the bringing of the action.

KILTY, C. J., was inclined to give the instruction as prayed.

CRANCH, J., *contra*, that the act shall relate back to the time of the principal trespass. (*Quære.*)

Verdict for the defendant.

UNITED STATES v. WILSON.

Upon an indictment for stealing a check upon a bank it is not necessary to produce the check itself, in order to admit parol evidence that it was presented at the bank. *Quære*, whether a check drawn upon "The Office of Discount and Deposit, Washington," be good evidence to support an averment of a check drawn on "the Bank of the United States," the corporate name being "The President, Directors, and Company of the Bank of the United States."

INDICTMENT for stealing a check on the Office of Discount and Deposit, Washington, from a seaman.

Mr. P. B. Key, for the prisoner, objected that the United States ought not to be suffered to give the testimony of the officer of the bank respecting the prisoner's going to the bank with the

check, unless they produced the check itself, and proved the handwriting of the drawer.

The COURT overruled the objection, unless the prisoner can show that the check is in the possession or power of the United States.

The indictment stated the check to be "a check drawn on the Bank of the United States, and payable at the Office of Discount and Deposit, Washington."

The check proved was in this form — "Office of Discount and Deposit, Washington, pay to or bearer dollars."

Mr. Key, for the prisoner, contended that the evidence did not support the averment in the indictment respecting the check. That the variance between the check proved and that alleged in the indictment was material; that the indictment ought to have set forth the check in *hæc verba*, and that there was no such body corporate as the Bank of the United States. The corporate name being "The President, Directors and Company of the Bank of the United States." [1 Stat. at Large, 192.]

Mr. Mason, for the United States. By the Act of Maryland, 1797, c. 96, § 1, it is enacted "that if any person within this State shall steal or take by robbery, any check or checks, order or orders, drawn on any bank established, or that may be established under a charter from the government of the United States, or of any particular State, it shall be deemed and construed to be felony of the same nature, and in the same degree, as if the offender, or offenders had stolen or taken by robbery any other goods of like value with the money due on such check," &c.

And the Act of Congress establishing the Bank [1 Stat. at Large, 191,] enacts "that a Bank of the United States be established."

Every check drawn on the Office of Discount and Deposit is a check on the Bank of the United States. The branch is only an office of that bank. It was necessary to set forth the check according to its legal operation, and not according to its precise form. If a note of the Bank of the United States be refused payment at a branch, the suit must be against the Bank of the United States.

Mr. Key, in reply. If the check is not set forth *in hæc verba*, it ought, at least, to be stated according to its legal operation, which is not a check on the Bank of the United States, for there is no such corporate body, but on the President, Directors and Company of the Bank of the United States.

KILTY, C. J., was of opinion that the variance was not material, and that the check was well set forth in the indictment.

CRANCH, J., *contrâ*. The check is not set forth *in hæc verba*, nor according to its legal effect, and therefore it does not appear

 United States v. McCormick.

that the check proved is the same which is averred in the indictment.

MARSHALL, J., absent.
Verdict for the prisoner.

 FENWICK v. VOSS.

When a cause is continued at the costs of a party, no execution can issue for them. The proper remedy, if they are not paid, is an attachment of contempt.

FIERI FACIAS for costs.

Mr. Hewitt obtained a rule to show cause why this execution should not be quashed and the money restored to Voss. The action had been continued at the costs of Voss, at a former term, and before final judgment in the cause *Mr. Peacock*, for the plaintiff, had ordered this execution for those costs.

Rule absolute, the COURT being of opinion that an execution could not be issued without a judgment, but that the remedy, in such cases, is by attachment of contempt, if the costs are not paid upon demand.

 UNITED STATES v. MCCORMICK.

The informer is not entitled to one half of the penalty on a minister for marrying a woman under sixteen years of age without the consent of her parents or guardian; and is therefore a competent witness. *Quere* — Whether, on an indictment, upon a statute, charging an act to be done knowingly, the *scienter* must be proved "if the statute does not use the word knowingly."

THE Rev. A. T. McCormick, an Episcopal clergyman, was indicted for marrying Mary Ann Densley to Matthew Lawler, without the consent of her parents, (she being under the age of sixteen) against the Act of Maryland, February, 1777, c. 12, § 9, which is in these words: — "And be it enacted, that if any minister shall join in marriage any male under the age of twenty-one years, or any female under the age of sixteen years, and not before married, without the consent of the parent or guardian of every such person, personally given, or signified under the hand and seal of the said parent or guardian, and attested by two witnesses, he shall forfeit and pay five hundred pounds current money." The indictment was as follows:

United States, District of Columbia and County of Washington,
to wit:

The jurors for the United States for the District of Columbia

and county of Washington, upon their oath, present that Andrew Thomas McCormick, late of the county of Washington, clerk, upon the twenty-third day of July, in the year of our Lord Christ one thousand eight hundred and two, with force and arms, at the county of Washington aforesaid, did unlawfully, knowingly, and wilfully solemnize matrimony between Henry Lawler, late of the county of Washington aforesaid, then a bachelor, and one Mary Ann Densley, then a single woman, daughter of one Hugh Densley, late of the county of Washington, without the consent of the said Hugh Densley, and without the consent of Mary Ann Densley, wife of the said Hugh Densley and mother to the said Mary Ann Densley first named, personally given or signified under the hand and seal of the said Hugh Densley, or the said Mary Ann his wife, and attested by two witnesses, the said Mary Ann Densley daughter to the said Hugh Densley, and Mary Ann his wife, then and there being under the age of sixteen years, and not before married; in contempt of the laws of the land, to the evil example of all others in like cases offending, against the form of the statute in that case made and provided, and against the peace and government of the United States.

At the trial, *Mr. Key*, for the traverser, objected to Hugh Densley, as a witness, contending that he was entitled, as informer, to half the penalty, under the 2d section of the Act of Congress, supplementary to the Act concerning the District of Columbia. [2 Stat. at Large, 115.]

But the COURT overruled the objection.

Mr. Mason, for the United States, prayed the Court to instruct the jury that it is not necessary to prove that the traverser knew that the girl was under the age of sixteen.

Mr. Key contended that there could be no offence, if the traverser did not know that fact. The indictment has charged it to be done knowingly, and it would have been bad if it had not. The *scienter*, therefore, must be proved.

KILTY, C. J., was decidedly of opinion that it was not necessary to prove that the traverser knew she was under age. It was his duty to know it. The law was intended to punish his negligence as well as his guilt. He takes the risk upon himself, if he marries without the consent of the parent.

CRANCH, J., inclined to be of the same opinion, but expressed a wish that the point might be argued, upon a motion for a new trial, if the verdict should be against the traverser.

Verdict for the United States.

A motion was made for a new trial, but was afterwards withdrawn, and a motion made in arrest of judgment. 1. Because the indictment does not aver that the traverser was a minister, or

 Scholfield v. Fitzhugh.

person capable of legally joining persons in marriage, at the time of the offence. 2. Because it does not aver that the marriage was without the consent of the guardian.

Adjourned for argument. [*Post*, *United States v. McCormick*.]

THOMPSON & VEITCH v. NICHOLAS VOSS.

A writ of error is not a *supersedeas* unless served within ten days after the rendition of the judgment, although the parties should have agreed to a stay of execution for two months; and the writ of error should be served before the expiration of that time.

FIERI FACIAS. Motion to quash the execution, on the ground that a writ of error had issued, and the plaintiffs had joined in error at the Supreme Court. The judgment below was signed on the 27th of March, 1802, and the execution was, by consent, stayed two months, before the expiration of which time, viz., on the 19th of May, the writ of error was filed; and bond given and citation issued. On the 28th of May, a *ca. sa.* returnable to July term, was issued, but did not go out of the office. On the 8th of September, 1802, the *fieri facias* issued returnable to December term. At the Supreme Court of the United States in August, 1802, the defendants in error appeared and joined issue on the assignment of errors.

The COURT refused to quash the execution, being of opinion that the writ of error is not a *supersedeas*, unless "served by a copy thereof, being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment. Judiciary Act of 1789, § 23. [1 Stat. at Large, 85.]

SCHOLFIELD, v. FITZHUGH.

The court will not give leave to amend by changing the action from case to covenant.

MOTION to amend by changing the writ from case to covenant. No declaration nor cause of action was filed at the time of issuing the writ, which was ordered, by the plaintiff's counsel, to be in case.

The COURT refused leave so to amend, because it was changing the question, and not simply bringing its merits fairly before the Court. KILTY, C. J., *contrà*.

The same point was also decided in the case of *Nicholls v. Harrison*, at the same term.

Hodgson v. Dexter.

ARDREY v. WADSWORTH.

A plaintiff who has been discharged under the Insolvent Act of Maryland, of 1774, since the commencement of the action, is still competent to maintain it.

ASSUMPSIT. *Non assumpsit* and issue. The defendant offered evidence that the plaintiff had been released under the Insolvent Act of 1774, c. 28, since the bringing of this suit, and contended that the plaintiff's right of action was transferred to the marshal, and so the plaintiff has no subsisting cause of action.

The COURT was of opinion that the plaintiff can still support the action. CRANCH, J., doubting.

MORGAN v. VOSS.

If at the last calling of a cause for trial, the issue be not made up, and no rule to plead has been laid, the court will continue the cause at the request of the defendant, although it be the fifth term after the appearance term.

CASE. This was the fifth term after the appearance term. A rule to declare had been laid on the plaintiff at the last term. The declaration was filed at this term. No rule to plead had been laid. The cause was now called for trial, it being the last time of calling the cause, according to the rule of the court.

The plaintiff insisted upon plea and issue *instantly*.

The defendant contended for a continuance.

The COURT continued it. CRANCH, J., doubting; thinking the plaintiff ought to be nonsuit under the Act of Assembly of Maryland.

HODGSON v. DEXTER.

A casualty happening against the will, and without the negligence or other default of the party, is, as to him, an inevitable casualty.

A public agent of the government, contracting for the use of government is not personally liable, although the contract be under his seal.

COVENANT on a lease. (See a statement of the pleadings in this cause, 1 Cranch, Rep. 345.) The questions brought into view by the pleadings, were,

1. Whether the defendant was individually bound.

2. Whether the destruction of the building was an inevitable casualty, within the meaning of the covenant.

Mr. Woodward, and *Mr. P. B. Key*, for the plaintiff, cited

2 Mallory's Ent. 118; 1 Roll. Ab. 450; Dyer, 33; *Shubrick v. Salmond*, 3 Burr. 1637; *Monk v. Cooper*, 2 Ld. Raym. 1477; *Forward v. Pittard*, 1 T. R. 27; *Macbeath v. Haldimand*, 1 T. R. 172; *Unwin v. Wolseley*, 1 T. R. 674; 1 Bac. Ab. Tit. Covenant, 535, 536.

Messrs. Dexter, C. Lee, and Mason, for the defendant, cited 1 Roll. Ab. 808; Dyer, 66, (b); *Forward v. Pittard*, 1 T. R. 27; Comyn's Rep. 631; Jones on Bailments, 90, (49), 93, (51), 97, (53), 135, (73), 142, (78), 146, (79, 80), 149, (81, 82), 32, (18); Act of Congress, April 24th, 1800, authorizing the President of the United States to remove the public offices of the Government from Philadelphia to Washington, [2 Stat. at Large, 55]; 1 Bl. Com. 503; *Jones v. Le Tombe*, 3 Dallas, 384; *Syme v. Butler*, 1 Call, 105; *Cabot v. Bingham*, 3 Dall. 32, 39; 1 Salk. 364; Com. Dig. Tit. Pleader, 62; 8 Co. 120.

The Court was of opinion for the defendant upon both points, and that opinion, so far as it respected the first point, was affirmed by the Supreme Court upon writ of error, at February term, 1803. 1 Cranch, 345. But that court gave no opinion upon the question of inevitable casualty.

CRANCH, J., in giving his opinion upon that point in this Court, expressed himself as follows:

This question arises upon the demurrer to the first plea, which alleges that before the expiration of the lease the demised premises, "against the will, and without the negligence, or other default of the defendant, were burned and consumed by fire, happening from some cause to him then and yet wholly unknown;" "and that saving and excepting the damage occasioned by the said burning and consuming, he hath at all times kept in good and sufficient repair the said demised premises, and that he hath, at the end of the term, delivered up the same to the plaintiff, so well and sufficiently kept in repair, excepting," &c.

To this plea there is a general demurrer; and the question arising is, whether the facts stated in the plea bring the defendant's case within the exception of inevitable casualties.

It is admitted that a casualty may be inevitable without happening by the act of God, or by the public enemies of the country. In the present case the expression seems to me to mean only such casualties as are inevitable by the defendant, and not such as might not be avoided by the united efforts of the whole society. But it was contended, on the part of the plaintiff, that the plea obliges the plaintiff to prove more than ordinary negligence on the part of the defendant, and that such is the meaning of the expression in the plea, "negligence or other default."

I confess I do not so understand the plea, nor do I know

where the plaintiff's counsel will find an authority for their definition of the term. I consider negligence and default as synonymous words. Negligence is the want of care and diligence, and the degree of one is in inverse proportion to the degree of the other. The slightest degree of negligence is the omission of the greatest degree of care and diligence. Where there has been no negligence or default, there the greatest degree of care and diligence has been used. When, therefore, the plea avers that the house was burned without the negligence or default of the defendant, it is tantamount to saying that it was burnt notwithstanding the greatest degree of care and diligence on his part. The question then occurs, whether a casualty which happens notwithstanding the use of the greatest degree of care and diligence on the part of the defendant to prevent it, is not, as to him, an inevitable casualty.

It is unnecessary for us to inquire what degree of negligence is sufficient to charge the defendant, because the plea denies all negligence whatever. If issue had been joined on the plea, it might have become a question what degree of negligence the plaintiff must prove in order to maintain the issue on his part. The term negligence cannot be appropriated exclusively to the omission of any given degree of care and diligence. Its degrees are infinitely variable, from the omission of the greatest possible care, to the very boundary of fraud. I have no hesitation, therefore, in saying, that an accident which happens without the slightest degree of negligence or default of the defendant, is, as to him, an inevitable casualty.

Thus far the argument is grounded on the words of the plea, which I consider as a more advantageous plea for the plaintiff than any other which the defendant could have pleaded, because the issue might strictly have been maintained on the part of the plaintiff, by proving the slightest possible degree of negligence in the defendant.

But if the defendant had pleaded, in the words of the lease, that the house was destroyed by an "inevitable casualty," then the authorities cited by the defendant would have applied with great weight. The case of *Forward v. Pillard*, 1. T. R. 27, is a very strong one, to show that an accident happening by fire, without the negligence of the carrier, is an inevitable casualty; and the frequent use of the expression when applied to fire, by Sir William Jones, derives great force from his acknowledged accuracy of language, and profound knowledge of the law. Some of the old cases go so far as to call fire the act of God.

There are three modes of ascertaining the meaning of doubtful expressions in a contract: by common acceptance, by technical

Nailor *v.* Kearney.

definition, and by a reference to the subject of the contract and the general usage in the like kind of contracts. By common acceptance, unavoidable accident means, a casualty which happens when all the means which common prudence suggests have been used to prevent it. The technical meaning has been explained by the authorities cited, in which the expression has been used by learned judges and by eminent lawyers.

When we consider the subject of this contract, that it was the lease of a house for eight months only, we can hardly suppose that the lessee would take pains to insert a clause to guard himself from accidents which might arise from the unusual casualties of earthquakes, tempests, lightning, or public enemies, and entirely overlook the common accident of fire, or that he meant to make himself or the United States insurer against fire.

It is not usual for lessees, for short terms, to become the insurers of the premises against accidental fire, and I shall not presume a contract of that kind, unless it was in very express terms. For these reasons I think this demurrer must be overruled.

LINGAN *v.* BAYLEY.

The Court will not commit a bankrupt for want of bail, who has surrendered to the commissioners, and whose examination is not closed, although the forty-two days have expired.

THE bail surrendered the defendant, and the plaintiff prayed that he might be committed.

The defendant was declared bankrupt, on the 21st of August, 1802, and on the 2d of September he surrendered himself to the commissioners. The examination is not yet closed, although the forty-two days have expired. Bayley has appealed from the decision of the commissioners.

The COURT refused to commit the defendant.

Cooper's B. L. 175 and 343, was cited.

NAILOR *v.* KEARNEY.

Upon a bond conditioned to pay certain instalments, an action may be brought upon failure to pay the first instalment.

DEBT on a bond, conditioned to pay at three instalments, viz., 5th January, 5th April, and 5th July, 1802. Action brought on 17th March, 1802.

Currey v. Fletcher.

Mr. Peacock, for the defendant, demurred to the declaration, because there was no cause of action at the time the suit was brought. *Taylor v. Foster*, Cro. Eliz. 807; *Beckwith v. Nott*, Cro. Jac. 504; *Milles v. Milles*, Cro. Car. 241; *Rudder v. Price*, 1 H. Bl. 547; Esp. N. P. 205.

Judgment for the plaintiff on the demurrer.

CURREY v. FLETCHER.

If the verdict be for less than twenty dollars, in *assumpsit*, a nonsuit must be entered.

Suit brought for £8. Defendant proves payment of £6. Verdict for £2.

Judgment of nonsuit. Stat. 3 Jac. c. 15; 23 Geo. 2, c. 33, § 19; *Woolley v. Cloutman*, Doug. 245, 448; *Pitts v. Carpenter*, 1 Wils. 19; Act of Maryland Law, 1785, c. 46, § 7, & 1791, c. 68, of Small Debts.

MARSHALL, J., absent.

CIRCUIT COURT OF THE UNITED STATES.

MARCH, 1803, AT ALEXANDRIA, ADJOURNED TERM, FROM NOVEMBER, 1802.

SPECIAL SESSION.

ON the first day of the adjourned session, *Mr. Charles Lee* moved for a special session, for the trial of criminal causes, and cited the acts of Congress 24 September, 1789, (Judiciary Act,) [1 Stat. at Large, 73] ; February 13, 1801, § 8, [2 Stat. at Large, 89] ; and February 27, 1801, § 3, [2 Stat. at Large, 103.]

The COURT ordered a special session, to be holden on Wednesday next, for the trial of criminals, and a *venire* for a grand jury, &c.

The adjourned term from November, and the special court ordered for the trial of criminals, were held at the same time.

GILL *v.* PATTEN.

The Court will give the defendant leave to withdraw the plea of covenants performed, and to file a special plea, if it appear to be a plea to the merits, and not decidedly bad, leaving the plaintiff to his demurrer.

COVENANT for rent. Plea, covenants performed.

Mr. Youngs, for the defendant, moved for leave to withdraw the plea, and file a special plea, stating a covenant on the part of Gill that he would pay the ground-rent due to W. T. Alexander, but had not done it, whereby Patten was prevented from occupying fully, for fear of having his goods seized for that rent due to Alexander.

The first plea was put in at the rules in time. The Court not being certain that the plea offered is bad, and not being willing to decide upon the validity of the plea, permitted it to be filed.

 United States v. Veitch.

SUTTON v. MANDEVILLE.

The Court in Alexandria will not grant a commission to examine witnesses in a suit at common law, without affidavit showing it to be necessary for the purposes of justice.

The laws of Virginia, in the county of Alexandria, are to be considered, with respect to the laws of the United States, as common law, that is, not repealed without negative words or other and repugnant provisions upon the same subject. (*Quære.*)

DEBT on bond. Issue, and continued to next term.

Mr. Mason moved for leave to issue a commission to take depositions in the State of Massachusetts, under the Act of Congress, (Judiciary Act,) 1789, § 30, [1 Stat. at Large, 88.]

Refused by the Court, because not grounded on affidavit showing it to be necessary to the justice of the case.

A question was made whether commissions for taking depositions must be taken out under the law of Virginia, or whether they may be taken out under the Act of Congress, without the ten days' notice required by the Virginia law.

MARSHALL, J., said that he had been informed by the Chief Justice of the Supreme Court of the United States, that it was the opinion of that court that the laws of Virginia were to be considered in this district, with regard to the general laws of the United States, as the common law is considered with regard to the statute law, viz., that it is not altered without negative words, or an absolute inconsistency, so that both cannot stand together.



UNITED STATES v. ALEXANDER VEITCH.

SPECIAL SESSION.

On an indictment for murder, the declarations of the deceased, *in extremis*, and when sensible of approaching death, may be given in evidence as to facts, but not as to opinions.

INDICTMENT, for manslaughter of Richard Walker, on the 25th of February, 1803, by a stroke on the back of the neck, with a carpenter's iron square. He languished till the 5th of March following, and then died.

The declarations of the deceased were offered in evidence on the part of the United States, and admitted by the Court, being made *in extremis*.

Mr. Mason, for the United States cited *Drummond's case*, anno 1784, Leach, Cr. Cases, 308, 378, (case 158); *Woodcock's case*, Ib. 437, 563, (case 218.)

 United States v. Hooe & Company.

Mr. C. Lee, for the prisoner, contended that the rule was limited to the case of extremity — *in extremis*; it must be the declaration of a dying man who is sensible of his situation.

The witness, *Mr. Jamieson* stated that the declarations were made two days before the deceased became speechless and insensible, and three days before his death; that he was sensible of great danger of approaching death. Upon this testimony and considering the cases cited, the Court *nem. con.* admitted the declarations to be given in evidence, as to facts stated by the deceased but not as to his opinion of *Veitch's* motives, or malice.

 GRAHAME'S ADMINISTRATOR v. COOKE.

After plea of condition performed, replication, rejoinder, and special demurrer to the rejoinder, the defendant is not entitled to oyer of the plaintiff's letters of administration, nor to plead that the plaintiff is not administrator.

DEBT on bond with collateral condition. After plea of condition performed, and replication, rejoinder, and special demurrer to the rejoinder, *Mr. Simms*, for the defendant, prayed oyer of the plaintiff's letters of administration.

Mr. E. J. Lee, *contrà*, cited 4 Bac. Ab. 113, 114, Tit. Pleas and Pleadings, I. 12, 2; 5 Com. Dig. 478, 479, — that oyer cannot be demanded, after plea, nor after imparlance. And *Roberts v. Arthur*, Salk. 497, — that upon the *profert* of a deed, it remains in court all that term, but no longer, unless it be controverted; but letters testamentary, or of administration, do not remain in court, for the party may have occasion to produce them elsewhere. 36 Hen. 6, 30. The COURT refused to grant oyer.

Mr. Simms, for the defendant, then asked leave to file a plea in bar that the plaintiff was not administrator, which the Court also refused.

 UNITED STATES v. HOOE & COMPANY.

After a writ of error has been served and returned to the Supreme Court, the record is no longer before the court below and cannot be amended, although at an adjourned session of the same term, it appear that the writ of error has been dismissed in the court above at the request of the party praying an amendment.

MOTION by *Mr. Mason*, for the United States to amend the record by adding a statement of the case, according to the requisitions of the 19th section of the Judiciary Act of September 24th, 1789. [1 Stat. at Large, 83.] It was a suit in equity which, since the last term, had been carried up by writ of error to the

Supreme Court of the United States, and dismissed on the motion of the Attorney of the United States, because not accompanied by a statement of the facts upon which the decree was founded. This being an adjourned session of November term, 1802, the term in which the decree was rendered, it was contended that the decree was still in the power of the Court.

Mr. Swann and *Mr. Lee, contra*. The record is completely out of this Court — the cause is no longer here. This Court cannot amend a record, which, in contemplation of law, is not before the Court.

The COURT refused to make the statement of facts, because they conceived the whole cause and record were completely out of their power by the writ of error.

CRANCH, J., *contra* — because if a statement of facts now made, can avail the United States, let them have the benefit of it, if not it can do no harm.

Mr. Mason, then prayed an appeal, and cited the Judiciary Act of 1789, § 22, [1 Stat. at Large, 84,] showing that a decree in equity could not be appealed from under that law, the only remedy being a writ of error; and the Act of 13th of February, 1801, § 33, [2 Stat. at Large, 98,] giving an appeal; and the Act of 3d of March, 1803, § 2, [2 Stat. at Large, 244,] containing the same provision as that in the Act of 1801, excepting that the Act of 1803, expressly applies to decrees then already rendered.

Upon that appeal the cause was again carried up to the Supreme Court, where the decree was affirmed. (See *United States v. Hooe et al.* 3 Cranch, 73, 78.)

MARSTELLER v. FAW. — *In Chancery.*

Upon a deed made in 1779, reserving an annual rent of £26 current money of Virginia, forever, the rents accruing during the existence of paper money are to be reduced according to the scale of depreciation.

CRANCH, J., delivered the opinion of the Court.

In May 1779, at a public sale of lots contiguous to the then bounds of Alexandria, by the executors of John Alexander, for the benefit of his son, W. T. Alexander, (then under age,) by virtue of the will of John Alexander, — Peter Wise, for Jacob Sly, became the purchaser of a half acre lot, in fee simple rendering an annual rent of £26, current money of Virginia. Before any deed of conveyance was made, Faw, the defendant, purchased the lot from Sly, and on the 5th of August, 1779, obtained a deed in his own name from the executors of John Alexander in fee-sim-

ple, rendering an annual rent of £26 current money of Virginia, to William Thornton Alexander, who was also a party to the deed. No notice is taken, in the deed, of the existence of paper money, which was then a legal tender, but had much depreciated. Gold and silver were also current money, but were very scarce and difficult to be obtained. Marsteller, who, on the 29th of December, 1794, got an assignment of the rents and the reversion from W. T. Alexander, brought this bill to recover them from Faw.

It appears in evidence that Wise, when he bid off the lot, did not particularly understand in what kind of money the rents were to be paid, but supposed they would be payable in gold and silver, and therefore did not buy a lot for himself. That the rent was low at that time if payable in paper money, but high if payable in gold and silver, on account of its great scarcity. That the general opinion of those who attended the sale was that the rents would be payable in paper money as long as it should be current, and afterwards in gold and silver.

It is admitted by the parties that the contract was to pay the rent in such money as should be current at the time the rents would become payable. And that such was their understanding and intention at the time of executing the contract. The rents therefore were payable in paper money while that was current, but were afterwards hitherto payable in gold and silver. This being the nature of the contract, the question is whether the rents forever are to be reduced annually by the scale of depreciation established by the Act of the Virginia Assembly, passed at the November session, 1781, c. 22; Chancery revision of the Laws, p. 147—(see 1 Wash. 341, 342); or secondly, whether those rents only which became payable during the existence of paper money, are to be scaled; or thirdly, whether the whole rent is now to be paid in gold and silver; or lastly, whether the Court will establish any other equitable rule for the payment of the rents.

The sum of £26 reduced by the scale for August, 1779, will be only £1. 3s. 7½d. or \$3.94. This sum appears farther below the real value of the rent at that time, than £26—or \$86.67 was above its value. Lots in 1774, rented for 20 to 40 dollars—a lot opposite at 30 dollars in 1774—some as high as 45 dollars of equal value;—in 1784, lots less valuable rented at 133 dollars. Hence it appears that the scale of depreciation does not form a fair and equitable rule of interpretation of the contract. Besides, it seems to me that the admission of the parties that it was their intention that the rents should be payable in money current when the rents should become due, fairly excludes the case from the operation of the scale. Each party knew that at the time of the

contract, the rent, if payable in paper, was far below its real value. They knew that the paper was still depreciating, and that it would at a future time cease to be a circulating medium, either by its depreciating so as finally to become of no value, or by depreciating until it gained the par of gold and silver. Either event would produce the same effect. The uncertainty of that event was a risk which each party was willing to take upon himself; and both received a premium for that risk. The benefit to Faw was the present low rent and the length of time during which it might be paid in a depreciated currency. The contemplated advantage to Alexander was the future high rent, when paper money should cease. Faw might be further induced to take the risk of a future high rent from the probability that lots would increase rapidly in value in consequence of the progressive increase of the trade and population of the town. It seems to have been a speculation on both sides attended with no circumstance of fraud or oppression. Each party had the same means of making his calculations upon future events, and neither seems to have been disappointed in his expectations. Faw has had the opportunity of paying part of his rents in paper money, and the benefit of the increased value of the property, and it seems but right that Alexander should receive the benefit of the increased value of the currency. Parol testimony has been adduced, not to contradict or vary the deed, but to explain the ambiguous term current money of Virginia — two kinds of money being current at that time. They have very naturally explained the general understanding of those who were at the sale, and there seems to be no reason to doubt that it was the intention and expectation of both parties, that the rent should be paid in paper while current, but afterwards in gold and silver or other money current at that time, when the rents should become payable.

The contract then seems to be divided into two parts — the one to pay paper money for a certain period, and after that to pay gold and silver. The period for paying in paper has by subsequent events been ascertained to be the 1st of January, 1782. At which time the other part of the contract took effect, which was to pay the rents in the then current money, namely, gold and silver.

The Act of Assembly seems to contemplate only those contracts in which the parties themselves have not ascertained the relative value of paper money and gold and silver, and not those where they may have provided against the depreciation of the money, and its final abolition. The present seems to me to have been a contract of the latter kind. Both parties seem to

have had a full view of the existing state of things, and to have made an equally accurate calculation of future events.

The intention of the parties makes the contract. If the intention here was, as is admitted, to pay in paper money during its existence, and then in gold and silver, then it was a contract to pay in gold and silver after a certain period. The consequence is that as to the payments to be made after the period, the contract is not within the Act of Assembly, but as to those which were to be made before, it is.

But if this contract cannot be considered as a contract to pay part of the rents in paper money, and part in gold and silver, still the question will arise whether this Court has not power, under the fifth section of the Act of Assembly, to examine into the circumstances of the transaction, and make a rule of adjusting the rents, different from the scale of depreciation.

Upon this point, I consider the case of *Watson v. Alexander*, 1 Wash. 340, as decisive. The Court of Appeals in that case decided, that the fifth section was made as well for creditors as debtors. That the second section was intended to apply to contracts where no particular circumstances intervene; but where other circumstances do intervene, which would render the application of the rule unjust, whether to the creditor or the debtor, the Court under the fifth section have a right to award such judgment as to them shall appear just and equitable.

The next question, then, will be whether the circumstances of this case, render the application of the scale unjust. The annual rent, when reduced by the scale is only £1. 3s. 7½d. This cannot be a just rule, when lots of equal value rented, before the existence of paper money, for ten times, and after its abolition, at thirty times that sum in gold and silver. If, then, the application of that rule is unjust, what rule can this Court adopt more just and equitable?

It is, in general, just and equitable that contracts fairly made, should be specifically executed, where a specific execution is possible, and will not be attended with circumstances of peculiar hardship. The contract in this case is to pay the rents annually in current money. This is admitted to be money current at the time when the rents became due. In the years 1780 and 1781, the rents might have been paid in the then current money, that is, paper, or gold and silver, at the option of the tenant. Payment in paper money has now become impossible; but the legislature has declared what shall be an equivalent for those years. Let the rents of those years, therefore, be scaled. But after those years, the option of the tenant ceased. Gold and silver became the only current money. It appears to have been the intention of the par-

Marsteller v. Faw.

ties to pay in the current money of the time when the rents should become payable. It has now become possible to execute the contract specifically, and it appears to me that justice and equity require that it should be done, by paying the rents in the money which has been current ever since the year 1782.

Reversed by the Supreme Court of the United States. 2 Cranch, 10.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1803, AT ALEXANDRIA.

GENERAL ORDER. No person, indicted for misdemeanor, shall be obliged to go to trial at the term to which the *capias* shall be returned executed, provided he appear and plead to issue, and thereupon the recognizance shall be respited.

AULD, Agent for Dunlop & Co. v. HEPBURN & DUNDAS.

On a plea of tender, &c., the defendant holds the affirmative, and has a right to open and close the cause.

Parol evidence will not be received to explain a written agreement, until it is first shown that the expressions of the agreement are equivocal.

A demurrer in one cause between the same parties, whereby a particular fact is considered in law as admitted, is not evidence of that fact in another cause between the same parties.

DEBT for the penalty of an agreement, \$45,000. The defendants pleaded a tender of a deed of assignment.

The COURT was of opinion, *nem. con.* that the defendants held the affirmative of the issue, and had the right to open and close the cause.

Mr. Keith's evidence was objected to, because parol evidence cannot be given to alter the written agreement.

Mr. E. J. Lee cited *Meres v. Anselm*, 3 Wils. 275.

The COURT was of opinion, *nem. con.* that in order to let in parol evidence to explain the agreement, the party must first show that there are equivocal expressions in the contract, and that the evidence is to explain those equivocal expressions.

Mr. C. Lee, for the plaintiff, offered the record of the case of *Hepburn & Dundas v. Auld*, decided in this Court, and in the Supreme Court upon a writ of error, to show that by the demurrer in that case, the fact is admitted that the tender was not unconditional.

The COURT refused to permit the record to be read for that purpose, or to prove any other fact admitted by that demurrer.

The jury could not agree after being out three days.

UNITED STATES v. BETTY WRIGHT, a Slave.

A slave in Alexandria may be tried in this Court for larceny.

INDICTMENT under the statute for stealing goods. Some question arose how she should be tried. Under the law of Virginia, she would have been tried by five justices of the County Court, without a jury. Upon consideration of a former precedent in this Court, she was tried by a jury in the usual form.

Verdict, guilty. Judgment, 20 lashes, 1 cent fine.

UNITED STATES v. JAMES SNOW.

Upon a conviction of perjury, the Court may inflict the punishment of fine, imprisonment, and pillory.

INDICTMENT for perjury on the trial of Galloway. Verdict, guilty. Sentenced to pay a fine of \$100, to be imprisoned six months, and to stand one hour in the pillory.

SMITH v. POTTS.

The Court will not continue a cause because the plaintiff cannot find out the place of residence of his witness.

CONTINUANCE on the ground that the plaintiff could not find out the residence of his witness — refused.

DADE v. YOUNG & Co.

If a party has had no opportunity to cross-examine a witness against him whose deposition is taken under the Act of Congress, the Court will continue the cause.

CONTINUANCE granted on the ground that the defendant had no opportunity to cross-examine the witness whose deposition was taken under the Act of Congress.

STEPHEN STEVENS v. EDWARD LLOYD.

In assault and battery, on the plea of not guilty, the plaintiff is not bound to prove that the defendant struck or assaulted him first.

But on the plea of *son assault demesne*, the defendant must prove that the plaintiff assaulted him first.

ASSAULT AND BATTERY. The COURT instructed the jury that to support the issue on his part, on the plea of not guilty, the plaintiff was not bound to prove that the defendant struck him first or made the first assault; but that to support the plea of *son assault demesne*, the defendant must prove that the plaintiff made the first assault.

MAYOR AND COMMONALTY OF ALEXANDRIA v. BOWNE & Co.

If in an action of debt upon a bond with collateral condition, the entry of the pleadings be "covenants performed," "joined," the Court will send the cause back to the rules as not being at issue.

DEBT on auctioneer's bond, for the penalty of \$10,000, with a *profert*. On the back of the declaration is an indorsement in these words: "The plaintiff assigns for breach of the condition of the said bond in the declaration mentioned, this, to wit, that the said M. F. Bowne," &c., "have failed to pay to a certain Thomas Patton, the administrator of S. Wallace, deceased, £15. 9s. 8d. due and owing from them as vendue masters to the said Thomas Patton, as administrator as aforesaid, for the sales at vendue, of certain goods, wares, &c., deposited with the said Bowne, &c., in the year 1795, by the said S. Wallace, deceased, and by them sold at vendue as aforesaid." "Declaration filed April, 1802—May, rule plea—June,oyer of the bond and covenants performed, joined." The plea is not filed, but only noted on the minutes. There was no replication.

The COURT sent the cause back to the rules after striking out the entry of issue joined.

KILTY, C. J., absent.

BASTABLE v. WILSON'S ADMINISTRATOR.

After not guilty and issue, to an action of debt upon a judgment in Virginia, suggesting a *devastavit*; the Court will not suffer the defendant to plead *nul tiel record*, without showing sufficient cause why it was not pleaded before.

Nil debet is no plea to an action of debt on a judgment of another State.

DEBT upon a judgment of the Dumfries District Court suggest-

ing a *devastavit*; plea, not guilty and issue. Defendant moves now, when the cause is called for trial, to put in the plea of *nul tiel record*, without showing why he had not pleaded it before, or that it was now necessary for the justice of the cause.

Motion overruled by the COURT.

The defendant then offered the plea of *nil debet* — refused without argument. Judgment confessed saving equity.

UNITED STATES v. ELLIS.

If a statute prescribes a particular mode of enforcing payment of a penalty, it must be pursued, and indictment will not lie.

INDICTMENT for gaming. Verdict, guilty. Motion in arrest of judgment, that the Act of Assembly of Virginia, which gives the penalty, provides that it shall be recovered before a single magistrate in the same manner as small debts. It contains no prohibitory words, but says only, if any one shall play, he shall pay the penalty of twenty dollars — and does not say that the penalty may be recovered by indictment.

Mr. Mason, for United States, cited the following authorities: — Rev. Code, p. 112, § 24, 25, 26, which speaks of indictments for misdemeanors. § 28. The Court may order the clerk to issue summons, or other process. § 37. Where the penalty does not exceed twenty dollars, it may be sued for by petition, as in the case of other small debts. Page 106, § 1. Grand jury in District Court to present all misdemeanors. § 2. The like in County Courts. Page 107, § 5, the same as § 2. § 6. Where the penalty in the District Court does not exceed twenty dollars, the court may hear without indictment; so in County Courts where it does not exceed five dollars. By the Rev. Code, 183, 184, 185, § 13, the act is to be given in charge to the grand jury. Act of 1797, ch. 2, § 7 and 8.

Mr. Swann, for the defendant, cited the Gaming Act, Revised Code, p. 185, which prescribes a specific mode of recovering the penalty, and contains no prohibitory clause. 2 Hale, P. C. 171; Stubbs, Cr. Circuit Comp. 95; *United States v. Jesse Simms*, at Supreme Court of the United States, February, 1803; 1 Cranch, 252; 2 Burr. 803.

The COURT arrested the judgment on the authority of *Simms's* case, in the Supreme Court, February term, 1803.

KILTY, C. J., *contra*, thinking these cases differed from that.

EVANS v. BLAKENEY.

If it be agreed that the plaintiff's work shall be measured and valued agreeably to the customary mode in Alexandria, and if it has been so measured and valued, and such measurement and valuation be reduced to writing, the defendant cannot give parol testimony to prove that the plaintiff's work was not worth so much as was certified by the report of those who measured and valued it.

If the measurement and valuation of work be reduced to writing, parol evidence of the contents of that writing cannot be given, unless the writing be lost or destroyed or not in the power of the party.

If the plaintiff contract to do work on certain terms, and it be done by plaintiff and another, the plaintiff may recover for the whole in his own name.

ASSUMPSIT, on a written agreement, by which the plaintiff and defendant, one being a bricklayer and the other a carpenter, and each being about building a house for himself, agreed to do the work in his trade to the other's house: "Each work and materials to be measured and valued agreeable to the customary mode in Alexandria, and whatever balance there may be on either side, at any time they choose to have the work and materials valued, is to be paid in cash on demand. (Signed) Abel Blakeney, Jno. Evans.

The defendant offered to prove, by parol testimony, that the work done by the plaintiff was not worth so much as the valuers had alleged. The plaintiff objected, that if he proved that the work and materials were measured and valued agreeably to the customary mode in Alexandria, and that according to such measurement and valuation, such a balance was due, it is conclusive; and the COURT were of that opinion, and refused to receive such evidence.

It appeared, from the testimony of the witness, that the valuers had reduced the result of their valuation to writing and delivered it to the parties.

The COURT decided that parol testimony could not be admitted of the contents of that paper, without showing it to be lost, &c.

The plaintiff produced and offered in evidence a writing signed by one Bishop, and McLane, the witness, in which they state that, having been called upon by Evans and Burford, to measure and value, &c., they find a balance of £54. 10s. 1d. due from Blakeney to Evans and Burford.

The defendant objected, that this does not appear to be an award between the same parties. But the COURT overruled the objection, and permitted it to be read in evidence.

Verdict and judgment for the plaintiff. Affirmed upon error, in Supreme Court of the United States, February, 1804. 2 Cranch, 185.

MCNEIL v. CANNON.

The Court will permit a defendant to come in and confess judgment for the whole damages laid in the writ, although no declaration be filed.

MOTION by the defendant to appear and confess judgment.

Mr. Simms, for the plaintiff, *contra*.

Here is no declaration; and if no declaration, then no action; and if no action, then no judgment can be given. 3 Bl. Com. 290; Rev. Code, 85, § 33, § 88.

Mr. Youngs, for the defendant, cited Laws of the United States, March 2, 1793, § 7, [1 Stat. at Large, 335,] power of the Court to make rules of practice. Confession of judgment waives all error, even the want of a declaration. Judgment may be confessed to the amount of the damages in the writ. The plaintiff cannot lay more damages in his declaration than in the writ. A confession of judgment on the writ is a confession of judgment for every thing which the plaintiff can possibly demand in this action. The Act of Assembly requires that the cause of action shall be indorsed on the writ. The declaration is for the benefit of the defendant, to give him notice of the nature of the demand. The defendant is not bound to require it. The Act of Congress, [1 Stat. at Large, 266,] requiring the creditor to pay for the food of his debtor, imprisoned at his suit, applies only to debtors confined on execution, and not on mesne process.

Mr. Simms, in reply. The plaintiff may recover more than the damages laid in the writ, if the defendant does not pray oyer of the writ, and plead the variance.

The COURT permitted the defendant to be brought in and confess judgment for the amount of the damages laid in the writ.

MARSHALL, J., absent.

UNITED STATES v. SMITH.

If a juror be fined, and at the same term come in and offer a sufficient excuse, and the Court thereupon order the fine to be struck out, but the clerk neglect to enter such order, the Court will at the next term, on proper affidavits of the fact, order the fine to be struck out.

SMITH had been summoned as a petit juror, at June term, 1802, and failing to attend, was fined eight dollars. At the same term he came in, and offering a sufficient excuse, his fine was ordered to be struck out; but the clerk omitted to enter it, by mistake.

Wilson v. Stewart.

These facts appearing now by affidavit, the COURT at this term, June, 1803, ordered the fine to be struck out.

Same order in the case of Josiah Faxon.

MARSHALL, J., absent.

BROOKE v. PEYTON.

A new trial will not be granted on affidavit that the plaintiff has since discovered testimony to discredit a witness who was examined at the trial, if that witness be not the only witness to the point on which he testified.

MOTION for new trial on the ground, that since the trial the defendant had discovered evidence, before unknown to him, tending to discredit Violet, the principal witness against the defendant.

New trial refused. The only doubt was whether the discovery of evidence tending to discredit a witness who testified to circumstances only tending to prove the making and publishing the libel, was sufficient ground for a new trial; the witness not being the only witness to that point.

MARSHALL, J., absent.

WILSON v. STEWART *et al.*

In a chancery attachment against a British bankrupt, the Court will permit the assignees of such bankrupt, on giving security and producing a copy of the proceedings of the commissioners certified by a notary-public, at Liverpool, in England, who is certified to be such by the American consul at Liverpool, to be made parties to defend the suit, and to release the attached effects.

ATTACHMENT in chancery. Security given, attachment dissolved.

Mr. C. Lee moved that the assignees of Stewart, under a commission of bankruptcy taken out in England, might be admitted as defendants. And to show that they were the assignees, he offered a copy of the proceedings of the commissioners, certified by a notary-public at Liverpool, and a certificate of the American consul at Liverpool, that the notary was a notary-public duly commissioned, &c. Act of Assembly, Rev. Code, 168.

Mr. Taylor objected that this copy is not within the Act of Assembly, and there is no law authorizing such copy to be admitted as evidence.

Objection overruled, and the assignees made defendants.

Mr. C. Lee moved that Stewart might be admitted to answer by his attorney in fact.

The COURT did not refuse to suffer the answer by attorney to be filed.

PORTER v. MARSTELLER.

On motion to set aside an office judgment upon an injunction bond, the Court will not suffer the defendant to plead that the obligee was dead at the time of the execution of the bond.

MOTION to set aside office judgment, and file certain pleas, in an action of debt for the penalty of an injunction bond.

All the pleas were admitted except the second, which was that the obligee was dead before the execution of the bond, and so the bond void. This plea was refused, on the ground that the obligor had received the full benefit of his injunction upon the bond, and ought not now to be permitted, *ex gratiâ*, to avoid it by such a plea.

CIRCUIT COURT OF THE UNITED STATES.

JULY TERM, 1803, AT WASHINGTON.

THREE of the clerks in the public offices, being summoned as petit jurymen, were excused on that ground, on affidavit.

UNITED STATES *v.* ANDREW SCHOLFIELD.

An attachment of contempt, for not attending as a witness, must not be served in the court-house. If the witness arrives before service of the attachment, and makes a reasonable excuse, the Court will countermand the attachment on payment of the costs of issuing it.

ATTACHMENT for not attending yesterday as a witness. He attended this day before the attachment was served. The deputy marshal (Pratt) had called the witness out of the room in which the Court sat, into the corridor or vestibule adjoining, and which was the common entry into the court-room, and there served the attachment. Upon the witness being called upon to answer on oath to the attachment, and giving a reasonable excuse, he was discharged on payment of costs.

Afterwards, the same day, *Mr. Woodward*, for the witness, moved that he might be relieved from the payment of the marshal's costs of service of the attachment; and the above facts appearing on oath of the witness himself and admitted by the deputy marshal, the COURT ordered the return of the attachment to be quashed, and the attachment to be entered countermanded, on payment of the cost of issuing the attachment.

MARSHALL, J., doubting whether the presence of the Court was to be considered as extending beyond the room itself in which the Court sits.

SHERARD v. PONSONBY, }
JOHNSON v. PONSONBY, } *ca. sa. cepi.*

An execution upon an exemplification from Maryland, against a person not resident, nor having property within the district of Columbia, will be quashed on motion.

MOTION, by *Mr. Gantt*, for the defendant, to quash these executions, upon the defendant's affidavit, that he is not and never was a resident of the District of Columbia, but now resides and for many years past has resided at Bladensburg, in the State of Maryland; that he has not and never had any property, real or personal, in the District of Columbia.

The executions had issued upon exemplifications of judgments from Maryland, according to the 13th section of the Act concerning the District of Columbia, 27th of February, 1801. [2 Stat. at Large, 107.]

The COURT, *nem. con.*, quashed the executions.

FARRELL v. KNAPP.

The plaintiff's own oath is not evidence in any case, unless made within one year from the date of the articles charged.

Upon general *indebitatus assumpsit* for two hundred dollars, for work and labor, there must be evidence of an express promise to pay a certain sum.

A special agreement to do the work, at certain prices, cannot be given in evidence, on a general *indebitatus assumpsit*.

Mr. Woodward having, as he supposed, proved all the plaintiff's account for work and labor, except a sum of £3. 3s. 6d. for work done by the plaintiff himself, moved the Court to instruct the jury that the plaintiff's own oath should be taken as evidence of the sum of £3. 3s. 6d. The oath was made this day. The account did not state when the work was done, but the cause has been depending in court more than a year. The whole account amounted to £94.

The COURT refused to give the instruction.

Mr. Mason then moved the Court to instruct the jury that the evidence which tended to prove that a special agreement had been made as to the prices, did not support the general count of *indebitatus assumpsit*, for work and materials.

The testimony was, that it had been agreed between the plaintiff and defendant that the price of laying the bricks should be twenty-one shillings a thousand, and the arches at a certain price.

The COURT were of opinion, that upon this count for two hun-

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dred dollars for work and labor, the plaintiff must prove an express assumpsit for a certain sum; and that there being no count on the special agreement, it cannot be given in evidence in this action.

UNITED STATES v. KALDENBACH.

The corporation of Georgetown had no power, in 1803, to grant retailing licenses.

INDICTMENT for retailing spirituous liquors without license.

The defendant justified under a license from the corporation of Georgetown.

Mr. Morsell, for the defendant, contended that the corporation of Georgetown have either an exclusive or a concurrent right to license retailers and ordinary keepers, under the Act of Maryland, of 1799, c. 85, § 2.

Mr. Mason, contra. The general law was that the county courts should grant licenses. The corporation of Georgetown made several attempts, and at last, by the Act of November, 1799, c. 85, obtained the power to grant licenses; but the power was given to the "Mayor's Court of the Corporation," which was abolished by the Act of 27th February, 1801, § 16, and that court was to collect one tax for the State of Maryland, and another, not exceeding five dollars, for the corporation. After the District was separated from the State of Maryland, the tax for that State became improper, and the Act of 1799 could not be executed. The Act of Congress, May 3d, 1802, § 9, [2 Stat. at Large, 195,] directs that all such licenses shall be granted by the Circuit Court of the District of Columbia, and the tax shall be applied to the benefit of the county of Washington; and thereby repealed so much of the Act of Maryland, of 1799, as gave the power to the corporation of Georgetown.

By the COURT, (*nem. con.*) The fine must not be imposed. The Act of Congress of 3d May, 1802, cannot be carried into effect so as to collect the taxes, but by the intervention of this Court. By that act the power of licensing is exclusively vested in this Court.

UNITED STATES v. BARTON.

Manumitted slaves are good witnesses for or against a free mulatto in Washington county.

INDICTMENT for stealing a handkerchief. Upon the prisoner being brought to the bar, he appeared to be a mulatto.

Shannon v. Fox.

Two black witnesses, manumitted, were produced by the United States. Objection overruled and witnesses admitted, after reading the Acts of Assembly of Maryland, 1717, c. 13, and 1796, c. 77.

Barton was indicted as a freeman.

GENERAL RULE.

The Rule respecting taking up postponed cases is this :

THE COURT go over, in the morning of each day, the causes assigned for trial on that day, and call the witnesses. If the witnesses summoned do not attend when called, the counsel may order attachments.

The Court then return to the causes which have not yet been called for trial, and if the parties are not ready for trial, the cause called may be postponed by consent of the parties ; or if an attachment for a witness has duly issued, and proper steps have been taken by the party, and the attachment be not returned, or returned *non est*, it may be postponed at the intermediate cost of the party.

If all the causes of the day have been called for trial, and the Court have time, they will take up any postponed cause in which both parties are ready, if a prior postponed cause is not ready, by consent of both parties, to be tried ; in which case the first postponed cause in which the parties offer ready, shall be first tried. No cause postponed shall be tried without consent, until the last day set for trial of causes upon the docket.

SHANNON v. FOX.

The handwriting of a party cannot be proved by a comparison with the handwriting of his power of attorney filed in the cause, there being no proof of the latter.

Mr. Woodward, for the plaintiff, offered to prove the handwriting of Fox, by comparing it with his signature to the power of attorney filed in this cause, considering it as a matter of record.

THE COURT, (*nem. con.*), refused to allow it, on the ground that no proof was given of the signature of the power of attorney.

NOTE. — MARSHALL, J., was absent all this term, after Tuesday, 2d of August, and resigned before the next term.

BANK OF COLUMBIA v. G. SCOTT'S ADMINISTRATOR.

The Court will not suffer the general issue to be struck out to give the defendant leave to plead in abatement.

On the day set for trial of this cause, *Mr. Caldwell* moved for leave to strike out the general issue, and file a general demurrer, on the ground that he is named in the writ and declaration, administrator generally, whereas he is administrator with the will annexed. *Non allocat.*

MARSHALL, J., absent.

MORGAN v. VOSS.

The Court will not continue the cause because a commission to examine a witness is not returned, unless the materiality of the witness be shown by affidavit.

COMMISSION to Virginia, issued March, 1802. New commission ordered July, 1802. Issued September, 1802. Interrogatories filed December, 1802.

Motion by *Mr. P. B. Key*, for the defendant, to continue the cause for want of a return of the commission. No affidavit of the materiality of the witness. Refused.

INGLE v. COLLARD.

In an action against A, who was surety for money advanced to B, the acknowledgments of B, as to receipts of money may be given in evidence to charge A.

COLLARD covenants that Ambrose White shall repay to Ingle money which Ingle might advance over and above what White might be entitled to for building a house for Ingle.

Mr. P. B. Key, for the plaintiff, offered to prove White's acknowledgment of the receipt of certain moneys and materials on account of the building.

Mr. Mason, for the defendant, objected to giving White's admissions in evidence. A judgment against White would not be evidence to charge Collard. A judgment against a sheriff shall not bind his sureties; so on an administration bond, the sureties are not bound by plea of the administrator, but may show a *plene administravit*. Ingle, if he chose to risk it, might examine White himself as a witness. Collard could not object.

Josse v. Shultz.

The COURT suffered the plaintiff to give evidence of the acknowledgment of White, as to the receipt of all such moneys and all such payments for labor and materials as came within the covenant.

MARSHALL, J., absent.

JOSSE v. SHULTZ.

If the landlord take a single bill of a third person for the amount of rent due from his tenant, and give time of payment to the third person until he fail, this is good evidence to support the plea of no rent-arrear.

REPLEVIN. AVOWRY, for sixty dollars, for six months' rent due on a demise, not under seal. Shultz called on Josse for the rent, and threatened distress. Josse could not raise the money, and for the express purpose of raising the money to pay the rent he offered to sell a billiard-table to Hankart for sixty dollars. Hankart agreed to take it, but not having the money offered his note to Josse, payable at thirty days. Josse agreed, provided Shultz would take the note. Shultz agreed, and Josse made a bill of sale to Hankart, who took the table to his own house. Hankart gave a single bill to Josse, for sixty dollars, payable at thirty days, due January 4-7, 1802. On the note's becoming payable, Shultz called on Hankart, who could not pay, and notice of non-payment was given to Josse afterwards, to wit, on the 9th of January. Shultz agreed to give further time on Hankart's giving to Shultz a bill of sale of the billiard-table; this was given, and was absolute in form. Shultz was, by a verbal agreement made at the time of executing the bill of sale, to be at liberty to sell the table when he pleased, or to take it away. About the 1st of February Shultz called on Hankart, and requested him to go with him to Loring, the auctioneer, and request him to sell it at auction in two or three days. He did so. Before the sale Shultz came back and countermanded the sale, and informed Hankart he had or was about distraining for the rent. In a few days after the billiard-table was seized for rent due from Hankart.

The plea was, no rent arrear, and issue. The question was whether these facts are evidence tending to support the issue on the part of the defendant.

KILTY, C. J., delivered the opinion of the Court. The acceptance of the note alone is not a discharge of the rent, unless it appears that the note is paid.

But if the jury should be of opinion, from the evidence, that the note was held up by Shultz, and credit given on it to Hankart,

Rogers v. Fenwick.

either by taking an additional security on it, or from any other cause, or that by any negligence of Shultz, Josse has lost the sum intended to be secured by the note, these facts are competent evidence to the jury to show that there was no rent due to Shultz, and that his avowry for such rent is not supported.

MARSHALL, J., absent.

ROGERS v. FENWICK.

In order to make the plaintiff's own oath evidence in support of an account where the dealings do not exceed £10 in one year, the affidavit must aver that no security has been given for the debt, and must pursue exactly the form prescribed in the Act of Assembly of Maryland.

ASSUMPSIT, on a physician's account, amounting to twenty-five dollars, all in one year.

The account itself sworn to by the plaintiff, within the year, was offered in evidence by the plaintiff. The probate was in these words: — "Personally appeared William Rogers, and made oath on the holy Evangels of Almighty God, that the above account is just and true, and that he hath received no part or parcel of the same."

The COURT refused to admit the account as evidence, because the certificate of probate did not follow the words of the Acts of Assembly of 1729, ch. 20, § 9, and 1785, ch. 46.

CRANCH, J., considered the word "security" material, and that it meant, as in the gaming act, a note or other instrument by which the debt could be proved.

KILTY, C. J., doubting. MARSHALL, J., absent.

The declaration was "for sundry matters properly chargeable in account, as by an account thereof herewith in court produced and filed." The account was headed, "Mrs. Anne Fenwick." The defendant's counsel objected to the account going in evidence to the jury, because it did not appear to be an account against the defendant, whose name is Mary Anne Fenwick, and not Anne Fenwick.

But the COURT overruled the objection — the account being by reference made a part of the declaration.

The defendant proved by Doctor Gault that he was employed by Mrs. Fenwick, as the family physician, at a certain sum per annum, and that if he had been informed he should have considered himself bound to attend them. Voss had employed Rogers (having had no understanding with Mrs. Fenwick on the subject) to attend Mrs. Fenwick's negroes whom he had hired of her.

The COURT instructed the jury that if they should be of opinion that it was the general custom of the country, in the hiring of negroes, that the owner should pay for medicine and medical attendance, and that the defendant did not inform Voss that she had a family physician who was bound to attend to all her slaves, it was lawful for Voss to employ the plaintiff on the defendant's account, to administer the necessary and proper medicine to such of the slaves as might require it.

DAWES & BAKER v. CORCORAN.

Leading questions may be asked in cross-examining a witness.

ASSUMPSIT. *Mr. Mason*, for the defendant, in cross-examining the plaintiffs' witness, asked whether there was not an agreement that, &c. (stating certain terms.)

Mr. Key, for the plaintiff, objected on the ground of its being a leading question.

The objection was overruled, and the question permitted to be asked.

Mr. Key took a bill of exceptions. But no writ of error was issued. See Peake's L. E. 135.

GREEN & ENGLISH v. FRY.

Indebitatus assumpsit lies upon the judgment of a justice of the peace.

ASSUMPSIT for the amount of two judgments given by a justice of the peace in May, 1801.

Mr. A. B. Woodward offered the warrants and judgments in evidence.

Mr. Baker, for the defendant, objected that the action ought to be debt; and that the judgments are not evidence in assumpsit.

Mr. Woodward, in reply. The judgments are not matter of record, and are good consideration for assumpsit.

At December term, 1803, judgment was rendered for the plaintiff. KILTY, C. J., doubting. FITZHUGH, J., *contrà*. CRANCH, J., clearly for the plaintiff.

KROUSE & GLOYD v. DEBLOIS.

The plaintiff cannot recover upon a general *indebitatus assumpsit*, if a special agreement be proved.

GENERAL *indebitatus assumpsit* and *quantum valebat* for 418 pounds of beef sold and delivered.

The defendant offered to prove a special agreement between the plaintiffs and defendant, on which the beef was delivered.

Mr. Mason, for the plaintiffs, moved the Court to instruct the jury, that he was entitled to recover for the beef delivered, although a special agreement should be proved.

But the COURT, (MARSHALL, J., absent,) refused to give the instruction. The authorities cited, were: Esp. N. P. 130, 138, 140; *Rolleston v. Hibbert*, 3 T. R. 412; *Cates v. Knight*, 3 T. R. 444; *Cutter v. Powell*, 6 T. R. 320; *Payne v. Bacom*, Doug. 651; *Robinson v. Bland*, 2 Burr. 1098; Precedents of Declarations, (Boston, June, 1802,) p. 18 and 19.

Mr. Mason prayed leave to amend, which was granted, on payment of costs and a continuance.

HOLMEAD v. FOX.

The original by-laws of Georgetown need not be made under the seal of the corporation.

A constable, appointed by this Court, and residing in Georgetown, is "a constable of the town of Georgetown and precincts," within the meaning of the by-law concerning hogs.

TROVER for hogs. The defendant justifies under a by-law of Georgetown, authorizing any person to take up hogs going at large, &c.

Mr. Woodward, for the plaintiff, objected to the copy of the by-law offered in evidence, because the original by-law did not appear to have been made under the seal of the corporation, although the copy produced was attested by the clerk of the corporation, as a true copy under the seal of the corporation, and also by the mayor, who has also annexed the corporate seal to his certificate.

The COURT overruled the objection; and a bill of exceptions was taken by the plaintiff.

Mr. Woodward, then objected, that the defendant was not "a constable of the town of Georgetown and precincts," within the

Offutt v. Parrott.

meaning of the by-law, having been appointed as a county constable by this Court.

But the COURT overruled this objection, also.

Verdict for the defendant.

FOXALL v. LEVI, special Bail of Stewart.

A bankrupt, surrendered by his bail, during the time allowed for his examination, will not be committed in execution.

AUGUST 6th, 1803. Stewart was surrendered in discharge of his bail; and being prayed in commitment, produced a summons from commissioners of bankruptcy in Baltimore, dated August 4th, 1803, to appear, &c., on the 5th of August, and the 25th of August, 1803, and the 15th of September next.

Upon which the COURT refused to commit him in execution.

The summons was simply signed by the commissioners, stating themselves as such. There was also a certificate that he did attend yesterday at Baltimore agreeably to his summons. See the bankrupt law of the 4th of April, 1800, § 22, which declares that the bankrupt shall be free from arrest; and on producing the summons or notice under the hands of commissioners, shall be discharged, if arrested.

OFFUTT v. PARROTT.

Security for costs cannot be given in the clerk's office.

A RULE was laid at December term, 1802, for security for costs. At the former sitting of this term, judgment of nonsuit *nisi*, was entered. Since the last sitting, Abner Cloud applied to the clerk's office, and offered to become the security. *Quære*, whether this is a compliance with the rule. The COURT thought it was not; that it must be done in court.

Present, KILTY, C. J., and CRANCH, J.

ANONYMOUS.

THE COURT decided, on a motion of *Mr. Woodward*, for a rule answer in Chancery, that such a rule need not be laid, but an attachment might go, of course, after the fourth day of next term.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1803, AT ALEXANDRIA.

UNITED STATES *v.* McFARLAND & others.

To constitute a riot it is not necessary that the unlawful intention should have existed at the time of meeting ; but if having met for a lawful purpose, the unlawful intent be afterwards formed and executed, it is sufficient ; and the unlawful act is evidence of the unlawful intent.

INDICTMENT for a riot.

Mr. Youngs for the defendant, moved to instruct the jury that if they are satisfied that the defendants did not assemble together with the intention to do an unlawful act, but met together innocently, and that the present affray happened without a previous intention formed by the defendants to do a wrong, then they must find for the defendants, on the 1st count—and on the 2d find only those guilty who are proved to have committed the unlawful act. 1 Hawk. 294 ; Act of Virginia, Rev. Code, 33, 39.

The COURT instructed the jury that if they found that an injury was done by four persons to the person or property of another, accompanied with force, it is not necessary to prove that they should have met with an intention to commit such acts in order to constitute a riot, but that without having met with such previous intention, if such acts are committed, arising from an intention or agreement formed after their meeting, they amount to a riot, and the jury may judge of and infer their intention or agreement from the acts committed.

As to the 2d part of the prayer, the Court said that all who were aiding, assisting or giving countenance, were equally guilty on the count for an assault and battery.

ELIZABETH ROSS *v.* NICHOLAS KINGSTON.

This Court has jurisdiction to require the father of a bastard to give security for its support.

MOTION to compel the father of a bastard to support it.

Mr. Jones for the defendant. This Court has no jurisdiction—

United States v. Murray.

it is not within the words of the Act of Congress of February 27, 1801, [2 Stat. at Large, 103,] or of the act of the 3d of March, 1801, [*ut sup.* 115.]

The Act of Assembly of Virginia gives a peculiar jurisdiction to the county court only. Rev. Code, 1792, c. 102, § 23. This is no crime or offence. If it is an offence, this is not the mode of prosecuting it.

The COURT overruled the objection to the jurisdiction.

Mr. Jones requested further time to obtain testimony to discredit the oath of the woman: Denied, because he ought to come prepared, or to have prayed further time before the cause was heard.

Mr. Jones moved the Court to permit the father to take the child to his own house to keep and maintain it, in case the Court should adjudge him to be the father: Refused, the power of binding out being with the overseers of the poor.

Order granted, to maintain the child by paying thirty dollars per annum for nine years; and to recognize himself in 270 dollars, with two sureties, 135 dollars each, to that effect.

 STEVENS v. LLOYD & others.

If a forthcoming bond has, by mistake, been given for a sum less than the judgment, it may, on the plaintiff's motion, be quashed, as well as the execution issued thereon, upon paying the costs of the motion.

NOTICE was given to this day of a motion for judgment on a forthcoming bond.

Mr. Swann, for the plaintiff, moved to quash the bond and execution — the execution having been issued without including costs, by an error of the clerk, in supposing that judgment for \$15, in assault and battery would not carry the costs.

Mr. Youngs, for the defendants, prayed that it might not be quashed without costs of the motion.

Quashed, at the plaintiff's costs.

 UNITED STATES v. FRANCIS MURRAY.

Quære, whether stealing a bank-note is larceny within the Act of Congress of the 30th of April, 1790, § 16.

INDICTMENT, under the statute, for stealing a watch, the property of Ben Brady, and a ten dollar bank-bill of the bank of ———, and twenty dollars in silver.

Mr. E. J. Lee, for the defendant, objected to evidence being given as to the bank-note, it not being larceny to steal a promissory note, or bond, &c., and cited, *Leach*, Cr. Law, 1, 403; *Morris's case*, 8 Co. 33 a & b; 4 Bl. Com. 234.

Mr. Mason cited no authorities but argued generally.

The COURT were of opinion that the evidence might go to the jury; they were inclined to be of opinion that bank-notes were within the meaning of the words, "*personal goods*," in the act of Congress, [1 Stat. at Large, 116]; that the case in *Leach*, 403, was upon the construction of the Act of Parliament, and not binding as to the construction of the Act of Congress. That if the jury should find the prisoner guilty of stealing the bill only, the question might come on again on a motion in arrest of judgment. If they should find him generally guilty, they would consider the question in fixing the fine.

The jury found the prisoner "guilty of stealing the *watch only*."

Mr. E. J. Lee, for the prisoner, moved in arrest of judgment, that the jury had not found him guilty or acquitted him of the other things charged in the same count, to wit, the bank-note and the silver dollars, so that if he should be indicted again he would not be able to plead the conviction or acquittal.

But the COURT overruled the motion and gave the judgment — 39 stripes and 10 dollars fine, &c.

GOVERNOR OF VIRGINIA v. WISE & others, Sureties of C. Turner, Town-Sergeant.

In debt on a sheriff's bond, his return upon an execution that he had satisfied the plaintiff, is not evidence for the defendants. Upon a breach assigned in not paying money received upon a *fi. fa.* the plaintiff must prove that the sheriff received the money before the return day of the execution.

If the plaintiff produce the return as evidence of the receipt of the money, it is also evidence of the payment of it to the plaintiff, it being so stated in the return.

DEBT, on the official bond of the town-sergeant. The breaches assigned were in not paying over to the plaintiff money received upon sundry executions.

The COURT refused to suffer the defendants to produce in evidence the return of the town-sergeant upon the executions, in which he stated that he had satisfied the plaintiff.

The COURT also, on the motion of *Mr. C. Lee*, for the defendant, instructed the jury that the plaintiff must prove that the sergeant received the money before the return day of the execution; because after that day he had no authority to receive it.

Gill v. Patton.

Mr. Taylor, for the plaintiff, offered the execution-book as evidence of the return of the execution, and of the receipt of the money by *Turner*, and insisted that the word "satisfied" was a part of the return, which he was not authorized to make.

But the COURT instructed the jury that if the return was produced as evidence of the receipt of the money, it must be also admitted as evidence of the payment over to the plaintiff.

GILL v. PATTON.

To an action of covenant for rent, the defendant cannot plead that his lessor had not paid the ground-rent, according to his covenant.

COVENANT for rent. The plea was that the plaintiff had not paid the ground-rent to *Alexander*, the original landlord, whereby the defendant was prevented from occupying the premises for fear of being distrained for that rent. General demurrer.

Mr. Taylor, for the plaintiff, cited *Dawson v. Myer*, 1 Str. 712; *Monk v. Cowper*, 2 Str. 763; *Ld. Raymond*, 1477, S. C.; *Belfour v. Weston*, 1 T. R. 310; *Howlet v. Strickland*, Cowp. 56.

Mr. Swann, on the same side. This covenant is of no effect, because it could not support an action. Patton could not recover till he was damnified. There has been no eviction. 1 Esp. N. P. 323. The covenant pleaded in bar is to keep the premises exonerated from the payment of the rent due to *Alexander*.

Mr. Youngs, for the defendant. Whatever happens by the act of God or of the lessor, to prevent the occupation of the lessee, is a good bar to an action for the rent. Enjoyment of the premises is the consideration of the rent. Eviction is not necessary. 4 Bac. Ab. 366. Patton was not obliged to stay until his property was seized for the rent due to *Alexander*. Patton's rent to Gill was £18, per annum; Gill's rent to *Alexander* was £135, per annum. *Shep. Touch.* 376. Fear of distress is as available as an actual distress. So that Gill has broken his covenant. The reason why one covenant cannot be set off against another, is because the damages may not be equal. But here the breaches are equal from the nature of the thing. *Johnson v. Carre*, 1 Lev. 152. The covenants are dependent. The intention of the whole deed is to be taken into view. This plea prevents circuity of action. As to 1 T. R. 310, the defendant enjoyed the land, although the house was burned. But here the defendant is wholly deprived of enjoyment.

Mr. C. Lee, same side. The plea is just and equitable. The two covenants made but one contract. The defendant's covenant is a condition or limitation of the covenant of the defendant. The defendant was to pay so long as he was permitted to enjoy. *Shep. Touch.* 114, *Tit. Condition.*

Mr. Swann, in reply. It might be either a plea of entry and eviction, or of dependent covenants. Gill's covenant is not a condition precedent. Patton's rent became due 1st September; Gill's on 4th September. Where the covenant goes to the destruction of the whole contract, it may be pleaded in bar. This plea goes to set up unliquidated damages against a covenant to pay a sum certain.

Judgment for the plaintiff on the demurrer, at June term, 1804.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1803, AT WASHINGTON.

POE v. MOUNGER.

A recognizance of bail taken out of court is only *de bene esse*; and upon the return of the writ and recognizance the plaintiff may object to the sufficiency of the bail, and if adjudged insufficient the marshal is not discharged. In order to save himself he must take a bail-bond, for the appearance of the defendant in all cases.

MOTION to amerce the marshal, the bail named in the recognizance taken before justices of the peace, being alleged to be insufficient.

Mr. Mason, for the plaintiff. The Act of Maryland, of April, 1715, c. 28, § 2, requires that bail should be first given to the sheriff, by the defendant for his appearance, that is, by the usual bail-bond; and then, in order to save the necessity of his going into court to give bail to the action, he may enter into recognizance out of court, in the manner provided for by the act; but by the fourth section, it is to have only the like force and effect as if the same were taken *de bene esse* before the justices of the court during the sitting. And by the fifth section the courts may "make rules and orders for justifying such bails and making the same absolute, as to them shall seem meet, so as the cognizor or cognizors of such bail, or bails, be not compelled to appear in person in the Provincial Court to justify him or themselves." The Act of October, 1778, c. 21, only alters the form of the recognizance, but does not make the bail absolute. The sheriff ought, in all cases, to take an appearance bond; and, if he does not, he takes the bail-piece at his peril.

Mr. P. B. Key, contra. The Act of 1715 was to take away the necessity of a bail-bond. The recognizance is the same thing as if taken in court. The fourth section of the Act of 1715, requires that the court shall, upon the appearance being entered for the defendant, receive the recognizance of bail so taken. The

Act of 1778, c. 21, § 5, requires the justices, who take the bail, carefully to examine into the sufficiency of such bail, and to be careful that they do not take insufficient bail; which would be unnecessary if the sufficiency was to be examined into again in open court. The justices out of court act judicially in taking bail, and their judgment is conclusive, they are substituted for the court. If bail is taken in court the marshal is discharged, he has no power to take the party again. It is not necessary that the sheriff should take a bail-bond, if he returns a regular recognizance of bail to the action.

Mr. Mason, in reply. Before 1715, the law of Maryland was as in England. This recognizance before justices is only *de bene esse*. The object of the Act of 1715, was to save the trouble of going to court to give bail to the action; which the defendant was bound to do, by his bail-bond given to the sheriff. The bail-bond is not discharged until the recognizance is returned and approved by the court. It is to have the same effect as a bail-piece *de bene esse* taken in court.

What is the meaning of the terms *bail de bene esse*, used in the act? and why should it provide for rules for making the bail absolute, unless the plaintiff had a right to object to the sufficiency of the bail upon the return of the bail-piece?

The marshal ought to take a bail-bond, and on taking such a bond, the defendant is then discharged from his custody, and he cannot take him again.

The COURT was of opinion, that the bail-pieces were not absolute, but open to objection as to the insufficiency of the bail, and that when objected to they were not to be received without the bail's justifying. But the Court made an order that any affidavits made by the bail before a justice of the peace of Washington county, should be deemed as if taken in court.

The bail-pieces not being received, the marshal was called and produced the defendant, who was committed.

BENNETT v. PENDLETON.

RECOGNIZANCE of bail. The same order was made in this case as in the preceding; the plaintiff's counsel having alleged that the recognizers resided out of the District of Columbia.

The defendant was committed for want of bail; and a rule entered that the bail should not be received without justifying.

 Davis v. Georgetown Bridge Company.

BARCLAY v. GOVERS.

The Court, on motion, will appoint a guardian *ad litem* for an infant defendant.

CASE for goods sold.

On motion of *Mr. E. B. Caldwell*, alleging that the defendant was an infant, James Thompson was appointed guardian to plead for the defendant. FITZHUGH, J., absent.

 GENERAL RULE.

The clerks in the public offices are not to be summoned as jurors.

A GENERAL ORDER was given verbally to the marshal not to summon the clerks in the public offices as jurors.

 SHARPLESS & SMITH v. BENJAMIN ROBINSON, Garnishee of
Henry and Peter Bowman.

If execution issue before the end of the term in which the judgment was rendered, it may, on motion, be quashed and the judgment rescinded.

At last term, the garnishee having been returned summoned, and not appearing, judgment of condemnation was entered against him for £119, being the whole amount of the plaintiffs' claim. A *ca. sa.* issued on 14th December, 1803, returnable to this term, which commenced on the 26th of December, 1803. On Saturday, 24th December, 1803, at an adjournment of the last term, *Mr. Peacock*, for the garnishee, moved to appear and set aside the judgment and plead.

The motion (supported by the garnishee's affidavit) was continued over to this term. 1. Shall the judgment be set aside? 2. Upon what terms as to costs of the execution?

Judgment opened and execution quashed on the garnishee's paying the costs on the execution, pleading to issue, and going to trial this term unless cause of continuance be shown.

 THOMAS DAVIS v. GEORGETOWN BRIDGE COMPANY.

Indebitatus assumpsit will lie against a corporation aggregate upon an account stated by their treasurer, without examining him as a witness.

INDEBITATUS ASSUMPSIT for work and labor by the plaintiff as

a blacksmith ; plea, *non assumpsit* and issue. 1st Count a certain sum. 2d, *Quantum meruit*. 3d, *Insimul computasset*.

The plaintiff produced an account stated, and proved it to be in the handwriting of Walter Smith, the treasurer of the company, and certified by the three directors, Templeman, Lowndes, and Deakins.

Mr. Mason, for defendants, objected to the reading of the account to the jury as evidence, because Walter Smith was a competent witness, and his testimony could be procured. That the best evidence ought to be had ; although the account is in the handwriting of Walter Smith, yet that does not authorize the reading of the account. The account is certified by Templeman, Lowndes, and Deakins, but it is not proved that they were directors ; nor that Smith was treasurer at that time ; and if he was, he had no right to bind the company.

Mr. Mason also contended that the company cannot assume by parol ; and cited *Bac. Ab. Tit. Corporation*, D. p. 8.

Mr. Morsell, contra. The objection does not go to the merits of the case. Every corporation aggregate has the power of appointing all necessary officers. *Bac. Ab. Tit. Corporation*, E., *Rex v. Bigg*, 1 P. Wms. 419. The Bank of England has no express power to issue notes ; nor has the Bank of Columbia, nor the Bank of Baltimore, nor any of the banks of the United States. *Assumpsit* lies against a corporation, upon an implied promise. *Impey*, 85.

The COURT (*nem. con.*) permitted the account to be read in evidence ; and instructed the jury that if they should be of opinion from the evidence that the account was stated in the handwriting of Walter Smith, and that he was the treasurer, or authorized to settle their accounts, the account was proper evidence in support of the issue. And that if they should also be of opinion that Templeman, Lowndes and Deakins were directors at the time of certifying the account, or were the authorized agents of the company for the purpose of making contracts, their signature of the account was also proper evidence in support of the issue.

UNITED STATES v. NANCY SWANN, a free Mulatto.

A slave is not a competent witness for a free mulatto in a public prosecution.

INDICTMENT for theft.

Mr. Hewitt, for the defendant, prayed for a summons for a negro slave as a witness for the defendant. The COURT inclined

to think that the slave could not be a witness against her, and therefore not a good witness for her, and refused the summons.

MCDONALD & HOLMES v. JANE WHITE.

After the year has elapsed, execution cannot issue here upon a judgment in Maryland, without a *scire facias*, notwithstanding the 13th section of the Act of Congress of 27th Feb. 1801.

MOTION by *Mr. Peacock* to quash a *ca. sa.*

The judgment was rendered in Montgomery County Court in Maryland, in March, 1800. No execution issued in Montgomery. The transcript was brought into this Court and the *ca. sa.* issued 29th September, 1803. By the Act of Congress of 27th February, 1801, § 13, [2 Stat. at Large, 107,] upon a transcript of the proceedings and judgment in Maryland filed, execution may issue here and shall be proceeded on in the same manner as if the judgment had been rendered here. But an execution, could not issue upon such a judgment obtained here, without a *scire facias*.

Execution quashed with costs.

CRANCH, J., declined giving an opinion, having been counsel for the plaintiff in the original action in Montgomery county.

UNITED STATES v. EVAN EVANS.

Indictment lies for acting as constable without giving bond.

INDICTMENT for acting as constable without giving bond agreeably to the 4th section of the Act of 3d May, 1804.

Verdict—Guilty of serving warrants, but not of serving any execution.

Mr. Peacock, for defendant, contended that the object of the law was only for the security of creditors as to receipt of money on execution.

But the COURT (*nem. con.*) was of opinion that the omission to give the bond was a violation of duty; and fined the defendant one dollar.

UNITED STATES v. JOHN F. ISMENARD, JOHN ISMENARD, and
ROBERT SMITH.

A public gaming-house is a public nuisance at common law. Upon a joint indictment the judgment must be several.

INDICTMENT for keeping a public gaming-house.

1st Count. Common nuisance. 2d. Under the Act of Assembly of Maryland, 1797, c. 110, prohibiting faro-tables, and other gambling devices, to be kept by tavern-keepers and retailers of wine and spirits.

Mr. Mason, the Attorney for the District, cited 1 Hawk. 360, 362, that a public gaming-house is a common nuisance.

Mr. E. B. Caldwell and *Mr. P. B. Key*, contended that playing at cards or dice is not *malum in se*; nor in itself an offence at common law. 11 Co. 87, (b). And that a public gaming-house is no offence at common law unless it become disorderly, so as to disturb the neighbors. 4 Bl. Com. 167, 171.

But the COURT (*nem. con.*) instructed the jury that a public gaming-house is a common nuisance. The verdict having been rendered against the defendants upon the first count only, and the indictment being joint, it became a question whether the judgment should be joint or several; and the following authorities were cited: *Jones v. The Commonwealth*, 1 Call, 555; *Godfrey's case*, 11 Co. 42; 2 Hawk. B. 2, c. 48, § 10, 17, 18, p. 633; *Esp. N. P.* 420; 2 Hawk. c. 25, § 89, p. 342.

The COURT imposed the fines severally: namely, on J. F. Ismenard, \$133½, on John Ismenard, \$50, on Robert Smith, \$25; and required each of them to give security in five hundred dollars for his good behavior for one year.

UNITED STATES v. CATON.

It is a contempt of court in a witness to refuse to answer proper questions before the grand jury, for which he may be fined, and required to give security for his good behavior.

ATTACHMENT of contempt on complaint of the grand jury, signed by their foreman, that Caton had refused to answer questions, and behaved in an insolent manner, and had threatened some of the grand jurors. Upon examining on oath two of the grand jurors, and the facts being proved, he was fined five dollars and ordered to give security for his good behavior for one year, himself and one surety in fifty dollars each—or himself in fifty dollars with two sureties in twenty-five dollars each.

Wilson Bryan's Case.

MURRAY v. DOWLING.

An attorney at law cannot be compelled to disclose any fact the knowledge of which has been communicated to him by his client.

REPLEVIN. Avowry for rent-arrear — plea in bar, no rent-arrear — general replication and issue.

Mr. Peacock requested a postponement of the trial on account of the absence of the person who had possession of the original lease. *Mr. Hewitt*, for the plaintiff, pressed the trial. *Mr. Peacock* waived his application for a postponement, and offered ready.

On the trial *Mr. Peacock* being sworn as a witness, *Mr. Hewitt* asked him whether there was a lease in writing. *Mr. Peacock* stated that his knowledge upon that subject was derived from his client, in his capacity as counsel, and prayed the opinion of the Court whether he was bound to answer.

The COURT was of opinion he ought not to be compelled to answer, and sustained the objection.

WILSON BRYAN'S CASE.

A juror cannot be permitted to make solemn affirmation in lieu of oath, unless he be one of those people who hold it unlawful to take an oath on any occasion.

TUESDAY, Jan. 3, 1804. Wilson Bryan, having been summoned as a juror for trial of causes for this day, and being called to be sworn in the case of *Lovering v. President and Directors of the Bank of Columbia*, refused to be sworn, alleging that he was a Methodist. Being asked by the Court whether it was contrary to the principles of that religious society to take an oath, and having answered that he did not know that it was; but that although he had heretofore been sworn on juries, yet he was determined not to take an oath again, and persisting in his refusal to be sworn, the Court ordered him into the custody of the marshal. See the Bill of Rights of Maryland, § 36; Act of Assembly, 1797, c. 118. On Wednesday, the 4th of January, he submitted to be sworn, and was sworn by holding up his hand.

INGLE v. COLLARD.

A verdict does not cure a variance between the covenant alleged in the declaration and that produced on oyer.

VERDICT at last term for plaintiff. [*Ante*, 134.]

Mr. Mason, for the defendant, moved in arrest of judgment; that the breach set forth in the declaration is not a breach of the covenant produced upon oyer. Collard was only bound to refund in case the money which Ingle had paid before the date of the agreement, and the money paid by Ingle afterward to the workmen employed by White, and the money paid by Ingle for materials delivered, should amount to more than the whole house should be valued at by George Blagden.

But the breach alleged is, that Ingle had paid to White more money than he was entitled to receive for materials and workmanship, without saying any thing of the money advanced before the agreement, which the defendant had not refunded.

Mr. J. B. Key, for the plaintiff, *contrà*. Ingle avers a general performance of his part. The breach is well alleged in substance. The plea follows the breach, and the issue is correctly joined. A general assignment of a breach of a general covenant is sufficient. Esp. N. P. 298.

Mr. Mason in reply. The breach assigned must be clearly of a matter within the covenant. Esp. 299.

Judgment arrested. (See *Rushton v. Aspinall*, Doug. 683.)

LEVERING v. BANK OF COLUMBIA.

A ship lying in Baltimore, whose owners reside in Alexandria, is not liable for provisions and repairs, Baltimore and Alexandria not being foreign to each other. But the ship is liable to a seaman shipped for a voyage not prosecuted.

THIS was an action on the case for money paid, laid out and expended, and for money had and received. The bank having a claim against one Hamilton, a part owner of the ship Alexandria, caused her to be attached at Baltimore, and obtained judgment of condemnation. At the sheriff's sale, the plaintiff became the purchaser, but under an agreement with the bank that they should exonerate him from all liens and incumbrances on the ship. The seamen libelled the ship for wages, and the plaintiff finding their claim just, paid them, and now brought this action to recover the amount of such payments from the bank. It was admitted by the defendants that the plaintiff would have a right to recover,

if there were any claims against the ship for which the claimants had a lien at the time of the sale; and which the plaintiff had paid. The charges paid by the plaintiff were for the mate's wages, work done for repairs on the ship, and for provisions. It appeared that the mate was engaged at Alexandria, where the former owners lived, to go to Baltimore to take charge of the ship, and prepare her for sea; that when he arrived he found Hamilton's share attached, and in the custody of the sheriff; that after remaining on board about fourteen days, he was directed by the owners at Alexandria not to proceed in preparing the ship for sea, but to remain on board to take care of her: he was to have one dollar a day until that vessel sailed, after which he was to have thirty-six dollars per month as mate. He went on board the 10th of January, and remained on board till the 16th of June, when the ship was sold by the sheriff.

Messrs. Mason and Key, for the defendants, contended that, as to repairs and provisions, in order to make the ship liable they must be furnished while the ship was on her voyage, or else that there must be an express hypothecation; that Baltimore could not be deemed a foreign country as to Alexandria; and, as to the mate's wages, they admitted that if he was employed as a mariner by the owners, in contemplation of a voyage, and to prepare the ship for such a voyage, she was liable to him for his wages while so employed in port, but contended that, by his remaining on board after the orders of countermand were given, he remained there under a new contract, and was a mere ship-keeper, for which service he had no lien on the ship, and cited *Green v. Farmer*, 4 Burr. 2214; *Godin v. London Assur. Co.* 1 Burr. 494; *Ex parte Shank & al.* 1 Atk. 234; Ab. on Shipping, 91, 66, 108; *Rich v. Coe*, Cowp. 636; *Westerdell v. Dale*, 7 T. R. 312; *Abbott*, 288; *Watkinson v. Bernardiston*, 2 P. Wms. 367; *Wells v. Osmond*, 6 Mod. 238. The remedy of the plaintiff against the former owners is good for these charges.

Messrs. Gantt and Morsell, for the plaintiff. Whenever necessary supplies are furnished to a ship, the individual has a triple security; the master, owners and ship. In any case in which a master may hypothecate, if necessities are furnished, the ship is liable without hypothecation. The contract was made on the credit of the ship, and not on that of the owners, who, as to Baltimore, were in a foreign country, that is, in Alexandria. Mariners may libel where the compact is made on land, and cannot libel unless their lien on the ship is perfect. The cases cited are upon questions to the jurisdiction of the Court of Admiralty, not upon the nature of the contracts. 4 Ba. Ab. 615; *Yates v. Hall*, 1 T. R. 73, 2 T. R. 73; 1 Comyns, Dig. 391; *Wells v. Osman*, 2 Ld.

Raym. 1044 ; Cro. Car. 296 ; *Hoare v. Clement*, 2 Shower, 338 ; 4 Ba. Ab. 620 ; Abbott, 102 ; *Merritone v. Gibbons*, 3 T. R. 267 ; *Rich v. Coe*, Cowp. 636 ; 2 Bac. 176 ; *Ross v. Walker*, 2 Wils. 264.

KILTY, C. J., delivered the opinion of the Court.

That there was no lien as to the repairs and provisions, Baltimore and Alexandria not being foreign ports to each other. That to make the ship liable to seamen for work done in port, it is not necessary that they should be hired for a specific voyage ; that mariners may be hired by the owners themselves, and in such case they are not to be considered as relying solely upon the personal credit of the owners, and as losing their lien on the ship ; that if a mariner is hired for an uncertain voyage, and not a specific one, the owners or the master may discharge such mariner ; that if a seaman is hired for a voyage, and to do duty while in port in preparing for the voyage, and the voyage is not prosecuted, the ship is liable to such mariner for his service while in port ; that the claim of the mate in this case was a lien upon the ship if he remained on board under the first agreement ; but if the prosecution of the voyage was abandoned, and after the revocation of the first orders, he remained on board to take care of the ship in port, a voyage not being contemplated at the time of such revocation, his claim for wages which accrued subsequently was not a lien on the ship.

The jury could not agree, and a juror was withdrawn by consent, and the cause continued. (*Post*, December term, 1804, *Levering v. Bank of Columbia*.)

OFFUTT v. PARROTT.

A promise, in writing, made under a supposed previous legal liability which did not exist, is void for want of consideration. Jurors escaping from their room may be fined for their contempt.

ASSUMPSIT. Gabriel Greenfield had given a promissory note to Offutt in these words: "Georgetown, June 4, 1795. Sixty days after date, I promise to pay Thomas B. Offutt, or order, four hundred and six dollars, for value received. Gab'l Greenfield" — which note was indorsed by Parrott, in blank, by writing his name upon the back of it. There was also written on the back of the note, an engagement in the following words: "I do hereby promise and oblige myself, my heirs, executors and administrators, to pay or cause to be paid unto the within named Thomas B. Offutt, his heirs or assigns, the within sum of four hun-

dred and six dollars, in the said note mentioned, in case the said Gabriel Greenfield fails to do the same. Witness my hand, this 22d day of March, Anno Domini, 1796. Rich'd Parrott. Witness, Jas. S. Morsell."

Mr. Key admitted that the blank indorsement, by Parrott, did not create any legal obligation on him to pay.

Mr. Mason, for the defendant, insisted that the written engagement of Parrott on the back of the note was made under a misapprehension of the legal effect of his former indorsement, and therefore void, as being without a consideration, like money paid under a mistake.

Mr. Morsell was sworn as a witness, and called to testify as to the instructions given to him by J. M. Gantt, the agent of the plaintiff, and the declarations of Gantt to the defendant, as to the legal obligation which his blank indorsement had created, by which the defendant was induced to sign the engagement; *Mr. Gantt* being an attorney of this Court, and within the reach of its process.

Mr. Key objected.

The COURT admitted the evidence. CRANCH, J., doubting.

A bill of exceptions in this case stated: 1. The note of Greenfield to Offutt. 2. The engagement of Parrott written on the back. 3. That this engagement was proved by J. S. Morsell, the subscribing witness. 4. The defendant offered to prove by the said Morsell that previous to the making of the engagement, the note with Parrott's name indorsed in blank thereon, was put into the hands of J. M. Gantt, attorney at law, by the plaintiff to sue Parrott. That the said Morsell, being a student at law in Gantt's office, Gantt put the note with the blank indorsement thereon into Morsell's hands, to write a declaration. That Morsell not finding any precedent, returned the same to Gantt, who was of opinion that an action would lie against Parrott on that blank indorsement, and told Morsell to take the note to Parrott and tell him he was liable upon the blank indorsement to pay the amount of the note; but that if Parrott would enter into a written engagement to pay the same, that he, Gantt, would indulge him as to time. That Morsell informed Parrott of Gantt's opinion as to his liability, and made the proposition to him, as directed by Mr. Gantt; whereupon Parrott agreed to enter into the engagement to pay the amount of the note in the event of the plaintiff's not being able to recover the same from Greenfield; and in pursuance thereof Morsell wrote the engagement on the back, and Parrott signed it. 5. The record of a suit in Maryland, by Offutt, against Parrott, and offered to prove the identity of the parties. This record shows that Offutt had pursued legal steps to recover the money from Greenfield, but failed to recover.

No further or other evidence was offered.

The plaintiff prayed the direction of the Court to the jury, that if, from the evidence in the cause, they were of opinion and found that the name of Parrott was by him indorsed on said note to give credit thereto, and that the said note was passed to Offutt with the name of Parrott indorsed thereon, that then the said Parrott is liable on his special engagement of 22d March, 1796, on the said note made, although no suit at law could be supported on his original blank indorsement, and the plaintiff entitled to recover.

The COURT refused, but directed the jury that on the whole of the evidence offered as aforesaid, the plaintiff is not entitled to recover, and their verdict ought to be for the defendant.

CRANCH, J., absent.

A juror was withdrawn, by consent, three of the jurors having escaped out of the jury-room, through the window, contrary to the express command of the bailiff, as stated in his affidavit. One of them, John Dunlop, being informed that he might, if he thought proper, state any thing, on oath, in exculpation of the charge, was sworn; and stated, that finding the jury not like to agree, and there being a great deal of warmth among them, he thought it would be productive of no good to remain together, and made the best of his way out.

The two others, Richard Boer and Henry O'Reily, being also sworn, and stating only a similar excuse, were each fined by the Court fifteen dollars.

KROUSE & GLOYD v. DEBLOIS.

Under a contract to deliver rations of beef for a year, the plaintiff cannot recover for rations delivered for only a part of the year unless prevented by the act of the defendant from completing the contract.

A SPECIAL COUNT was filed, under the leave given at the last term, stating a special agreement to furnish rations for the marines for one year.

Mr. Mason, for the plaintiff, prayed the Court to instruct the jury, that although the plaintiffs had not supplied beef during the whole year, according to agreement, yet the defendant has no right to offset the unliquidated damages, for the plaintiffs not having continued to furnish the beef during the whole year, but that the plaintiffs were entitled to recover for as much beef as they did deliver. The covenants were mutual. *Esp. N. P. 281, 282; Boone v. Eyre, 2 Bl. Rep. 1312; Barker v. Sutton, Esp. N. P. 129; Trials per Pais, 186.*

Monroe v. Harkness.

Mr. Morsell, contra, contended that this was an entire agreement; and that the covenants were dependent. He cited Esp. N. P. 139, and 1 Str. 648.

Mr. Mason, in reply, cited *Barker v. Sutton*, Esp. 129, 281; Trials per pais, 186.

The COURT, (*nem. con.*) refused the instruction, and directed the jury that the plaintiffs are not entitled to recover for the quantity of beef delivered without showing a compliance on their part with the agreement declared on, to deliver rations of beef for the space of one year, in the manner stated in the special count in the declaration, unless such compliance was prevented by the act of the defendant.

Verdict for the defendant.

SAMUEL M'INTIRE'S CASE.

Juror not permitted to affirm.

SAMUEL McINTIRE being summoned as a juror in the cause of *Whelan v. Whelan*, and refusing to be sworn, although offering to affirm, and stating that he never had been sworn, but had been often affirmed on juries in other States as well as in this Court; that he preferred affirming to swearing; that he was not a quaker, nor attached to any particular religious sect; was ordered into custody of the marshal until the further order of this Court. Upon his offering to be sworn without kissing the book, but holding up his hand, he was discharged.

THOMAS MONROE, Superintendent of the City, v. SAMUEL HARKNESS.

ATTACHMENT for violating an injunction.

A RULE granted yesterday, on complainant's affidavit, to show cause why an attachment of contempt should not issue, for violating the injunction in proceeding towards completing a two-story wooden house. Upon further testimony in support of the rule it was made absolute, and an attachment was issued returnable immediately.

Thomas Monroe, Superintendent of the City, v. William Bradley.

THOMAS MONROE, Superintendent of the City, v. WILLIAM
BRADLEY.

The Court of Chancery will imprison for contempt in violating an injunction.

IN this case, a similar attachment was issued in the first instance. Both the defendants were ordered into close custody for the term of six days, the present day to be considered as one, and to stand further committed until the costs upon the attachment should be paid.

CIRCUIT COURT OF THE UNITED STATES.

MARCH 26, 1804, AT ALEXANDRIA, AN ADJOURNED COURT.

ROBERT HARRISON'S CASE.

Upon petition for *habeas corpus*, the petitioner must produce a copy of the warrant of commitment, or an affidavit that the jailer refused to give a copy.

PETITION for *habeas corpus*. Robert Harrison was committed for leaving his ship. (Act of Congress, June 20, 1790, c. 51, § 7.) [1 Stat. at Large, 134.]

Discharged.

The COURT required a petition in writing, and a production of the warrant of commitment, or a copy, or affidavit of refusal of the jailer to give a copy.

MEMORANDUM.

The adjourned term is an extension of the preceding session.

THE Clerk had brought forward, from the rules held since November, all the office judgments in chancery cases.

The COURT were of opinion that such causes were not regularly before them, the next term being the next succeeding court after the office judgments.

KILTY, C. J., absent.

ASKEW v. SMITH.

A defendant, arrested to appear at the next term, cannot come in and confess judgment at this term; the writ being returnable to the next term.

RULE to show cause why the defendant should not come in and confess judgment.

Mr. Youngs, for the defendant. Although the writ is not returnable to this, but to the next term, yet a confession of judgment cures all errors.

Wilson & Co. v. Dandridge's Executor, &c.

Rule discharged — the Court being of opinion that such judgment could not, at this time, be regularly entered, so as to avail the plaintiff.

—♦—

MAYOR AND COMMONALTY v. STEPHEN COOKE and others.

The defendant cannot appear to a chancery attachment in Virginia, without giving bail.

MOTION by *Messrs. Simms and C. Lee*, for the defendant, to appear on a chancery attachment, without giving security according to the Virginia Act of 1792, c. 78. 1. Because Dr. Cooke has so much real estate in town. 2. Because the attachment is for taxes; and taxes can only be recovered by distress and sale.

Appearance refused, without security.

—♦—

WILSON & Co. v. DANDRIDGE'S EXECUTOR and RICKETTS & NEWTON & others.

In a chancery attachment in Virginia, the Court may order the attached debt to be paid over to the plaintiff, on his giving security to refund, &c., although the plaintiff's right may be doubtful.

ATTACHMENT in Chancery. Motion by *Mr. Swann*, to order Ricketts & Newton, the garnishees, to pay the money to the plaintiffs on security to return, &c., under the second section of the Act of Virginia, of December 26, 1792, old Rev. Code, p. 122.

Mr. Jones, for Ricketts & Newton, two of the defendants. This Court has no jurisdiction to make an order that Ricketts & Newton should pay the money to the plaintiffs on their giving security, because the person (Comark) named as executor, has disclaimed the office of executor, and administration has been committed to James H. Hooe, who is made a defendant, and has answered. There is, therefore, no absent debtor. Even if Comark had acted as executor, under the will and probate in St. Domingo, yet he would have no control over the debts due to the testator in this district, according to the decision of the Supreme Court of the United States in the case of *Fenwick v. Sears's Administrator*, 1 Cranch, 259.

Mr. Swann, contra. The second section of the act is explained by the fifth section. The words of the second section, are, any absent defendants, and others within the State indebted to such absent defendants. The decision of the Supreme Court in *Fenwick v. Sears's Administrator*, applies only to administrators, not to

executors. The latter derive their authority from the will. The executor, therefore, is the real debtor, although the probate was in a foreign country.

Mr. Jones, in reply. The only evidence of the debt due from Ricketts & Newton, to Dandridge, is from their confession; the whole must be taken together, exactly as they have stated it. Hooe has obtained administration since filing the bill, and has been made a party at this term. It would interfere with the priority due to the bond debts, &c.

Mr. Swann. This is the business of the administrator to look to. Motion granted.

JOHN V. THOMAS v. D. C. BRENT, Marshal, &c.

The marshal may include his commissions in a forthcoming bond, and is also entitled to his commissions upon an execution on the bond.

RULE to show cause why the marshal should not return his commissions received on an execution upon a forthcoming bond, which included his commissions on a former execution levied upon goods.

Mr. Taylor, in support of the rule. The Act of Congress, of February 27, 1801, [2 Stat. at Large, 106,] § 9, respecting the fees of the marshal, refers to a former law respecting the marshal for the district of Maryland. If the fees are for a service not known by the laws of Maryland, or by Act of Congress, then the marshal is either not entitled to a fee, or he is entitled under the laws of Virginia of December 10, 1793, c. 151, § 13, New Rev. Code, p. 298; Dec. 24, 1794, § 11, New Rev. Co. 326, and the fee-bill of Dec. 19, 1792, New Rev. Co. p. 218, to a fee of sixty-three cents only. The property has not been actually sold nor replevied, nor has the debt been paid; the marshal, therefore, is not entitled to a commission.

Before the act of December 24th, 1794, the officer could not include commissions in the forthcoming bond. *Worsham v. Eggleston*, 1 Call, 48. By that act, the officer is allowed to include commissions in the bond, but shall not receive them unless the bond be forfeited. The act proceeded upon the principle that the officer was entitled to commissions, and only directs that they may be included. It was founded on a mistake of what was the law before, and therefore does not give the right to receive a commission. By the law of Maryland, 1779, c. 25, the officer is allowed the same fees on attachment as on execution, where the sheriff is chargeable.

By the Virginia law, the sheriff is not liable to the risk after bond given, and cannot be chargeable before, because the defendant has no right to tender a bond after the officer has removed the goods, and until removal, the officer is not liable.

Mr. Mason, contra. The bond satisfies the former judgment and execution. The laws of Virginia do not apply to the case. By the Act of Congress, the fees of the marshal of this district, are the same as those of the marshal of the district of Maryland; which by the Act of Congress of May 8th, 1792, § 3, [1 Stat. at Large, 276,] are to be the same as are allowed in the Supreme Court of the State. The law of Maryland is the only law applicable to the case. By the fee-bill of Maryland, the sheriff, for levying an attachment, or where the sheriff is chargeable, is entitled to the same fees as on executions; and upon a *fiery facias* the same as upon attachments; and upon any execution for money, he is entitled to 7½ per cent. on the first £10, and three per cent. on the residue. The words are, "or wherewith he shall be chargeable." Was the marshal chargeable for these goods? The case stated, is, that the *fiery facias* was levied on the goods. *Levying* means taking the goods into possession. Until the goods were discharged by the bond, the marshal was chargeable. The fee is for serving the execution, and making himself liable by the custody of the goods. The defendant may tender a forthcoming bond at any time before the sale. The time is not important; some time must intervene between the levying and the bond. Upon the second execution, the marshal has the same trouble *de novo*. There were two judgments, and two executions, and the marshal is entitled to his fees on both.

Mr. Youngs, and Mr. C. Lee, in reply. This, by the laws of Virginia, is one continued process, and constitutes but one execution. The process of a forthcoming bond is not known in Maryland. There is not a new judgment on the bond. It is only an award of execution. The words of the Act of Virginia are, that the bond shall have the force of a judgment, and therefore the court only awards execution.

Rule discharged, *nem. con.*

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1804, AT ALEXANDRIA.

UNITED STATES *v.* McFARLANE & others.

Riots are punishable at common law, notwithstanding the statute. Riot, and assault and battery, may be joined in the same indictment. Imprisonment is not a necessary part of the punishment of riot at common law. Upon an indictment for riot at common law, the term of imprisonment is not to be assessed by the jury.

INDICTMENT at common law for a riot, and for assault and battery.

Mr. Youngs moved in arrest of judgment. 1st. Because an indictment will not lie for a riot, the Act of Assembly of Virginia, of December 4th, 1786, Old Rev. Co. 38, 39, having prescribed a certain mode of prosecution. 2d. Because assault and battery cannot be joined with riot, in the same indictment. They require separate and different kinds of punishment. Riot is of a higher nature, and the assault and battery merges in the riot. The assault and battery may be justified, but the riot cannot. 1 Hawk. 294, 295. 3d. Because no specific, unlawful act is charged for which they assembled. "With intent to disturb the peace," is too general. *Regina v. Gulston et al.* 2 Ld. Raym. 1210.

Mr. Mason, contra. 1st. Riot is a common law offence. The statute is cumulative. See the last clause, which speaks of persons legally convicted otherwise than in the manner directed by that act. The statute of Virginia is copied from the English statute of 19 H. 7, c. 13; it has no negative words, and, therefore, the common law mode of trial is not taken away. 2d. As to the second point, no authority is cited, and no reason is given, why assault and battery, and riot, should not be joined in the same indictment, in separate counts. 3d. The third objection, is, that the indictment charges no specific unlawful act for which they assembled. The charge is, "to disturb and break the peace of the United States." This is a specific and sufficient charge. *Stubbs's Cr. Ct. Comp.* 386, 391.

Mr. Youngs, in reply, cited *United States v. Simms*, in the Supreme Court of the United States, February, 1803. If you

 United States v. Duffy *alias* Rustick.

indict under a statute, you must bring the case within the statute, and cannot resort to the common law.

Motion overruled, and judgment entered.

It was a question, whether, under the last section of the act, the jury were to ascertain the term of imprisonment, and whether imprisonment were not a necessary part of the punishment; but the Court decided both in the negative. *Quære*—see Old Rev. Co. 287, § 3 and 4; and p. 33, 38; and p. 112, § 26.

 UNITED STATES v. BENJAMIN RICKETTS.

If a man be present, and encourage an assault and battery, he is a principal.

ASSAULT AND BATTERY upon Robert Abercrombie, a constable.

Mr. Mason, for the United States, moved the Court to instruct the jury, that if the defendant was present and aiding, abetting, or encouraging the assault and battery, he was a principal.

Mr. Jones, for the defendant, contended that it was necessary he should have been present, and aiding, and abetting, and encouraging.

The COURT (*nem. con.*) gave the instruction. 1 Hawk. 58; 2 Hawk. 438; 2 M'Nally's Evidence, 524.

 UNITED STATES v. THOMAS DUFFY *alias* RUSTICK, and CHRISTOPHER DUFFY.

A confession upon oath, before a magistrate, cannot be given in evidence against the prisoner.

Possession is *prima facie* evidence of property.

INDICTMENT for stealing a cable.

Mr. Taylor, for the United States, produced *Mr. Hoffman*, the magistrate, to prove what the prisoners had testified before him on an examination of John Duffy, on a charge of stealing the cable; to show that they, being examined separately, had given opposite and inconsistent accounts of the cable, and to show their confession upon oath before the magistrate.

The COURT refused to admit the testimony, upon the authority of 1 M'Nally's Evidence, 47, Rule 12; Buller, N. P. 242; Leach's Cr. Ca. 248, 1st edition, (Irish.)

The indictment charged the cable to be of the goods and chattels of one Andry.

Mr. Swann, for the defendants, contended that the jury must be

United States v. Dunn.

satisfied that Andry had a general or special property, and that it being in Andry's boat, is not sufficient evidence of property.

The COURT directed the jury, that a qualified property was sufficient, and that the testimony of its being taken from Andry's vessel is competent to go to the jury, and that they must decide whether Andry had a qualified property in the cable.

UNITED STATES v. FRANCIS OMEARA.

Words accompanying actions may be given in evidence to show the intent. An officer having a warrant against a person in his custody, may hold him under it, without informing him that he is arrested upon it.

INDICTMENT for rescue of W. Aubrey, and assault and battery upon Abercrombie, the constable.

Under the Act of Assembly of Virginia of December 26, 1792, Old Revised Code 287, disturbers of religious worship may be restrained by a justice present. Abercrombie was ordered by Mr. Hoffman, a justice who was present, to take Aubrey into custody. He had also a warrant from Mr. Faw, another of the justices.

The COURT decided, that the words which the defendant spoke accompanying his actions, should be given in evidence against him, to show the intention of the defendant in his interference and in aggravation of the penalty.

Mr. Mason prayed the Court to instruct the jury that Omeara, being in custody of Abercrombie, under the order of Mr. Hoffman, was also in his custody under the warrant of Mr. Faw, although he did not inform the prisoner that he arrested him on that warrant.

Mr. Taylor, for the defendant, cited *Countess of Rutland's case*, 6 Co. Rep. 54, that it is necessary to inform the person arrested that he is arrested under a particular warrant, or he cannot be held under it.

The COURT gave the instruction as prayed by Mr. Mason.

UNITED STATES v. DUNN et al.

INDICTMENT for a riot. The witnesses for defendants were not allowed by the COURT to give evidence of their intention in meeting, they having testified that they were of the party concerned in the riot.

Cooke v. Myers.

AULD v. HEPBURN & DUNDAS.

An admission of facts by a demurrer in one suit, is not evidence of those facts in another suit between the same parties.

THE record of the suit of *Hepburn & Dundas v. Auld* was offered in evidence by the plaintiff to show that by demurring to Auld's plea, in that case, the defendants have admitted the fact, that the release was required.

Mr. E. J. Lee, for the plaintiff, cited *Lee v. Boothby*, 1 Keb. 720; 12 Viner, 82. Admissions upon record in other cases between the same parties, may be given in evidence.

Mr. Swann, contra, cited *Grills v. Mannell*, Willes, 380.

The COURT was of opinion (*nem. con.*) that the admission of facts by a demurrer cannot bind the party in any other plea, or in any other cause where the facts are put in issue.

RILEY v. COOPER.

After the jury has retired and returned into court to give their verdict, the Court will not permit a witness to be examined who has come into court since the jury retired.

THE jury having retired and returned, and being asked, said they had agreed on their verdict.

Mr. E. J. Lee prayed, before the jury declared their verdict, to examine a witness for the defendant who had come in since the jury retired.

Refused by the COURT. Verdict for the plaintiff, \$20.

COOKE v. MYERS.

Upon a judgment on motion upon a replevy bond for rent, the plaintiff is entitled to costs of the motion.

MOTION on a replevy bond for rent.

The rents were attached in the hands of the tenant at the time of the distress. The bond included costs of distress.

Mr. Youngs, for the defendant, contended that no costs could be given upon this motion, the plaintiff having released the costs of distress.

Judgment for the amount of rent due, and costs of this motion; the plaintiff having released the costs of the distress.

Bank of Alexandria v. Henderson.

RAMBLER v. CHOAT.

In an action at law by a seaman against the master, the plaintiff may read, in evidence, the answer of the master to a libel by the seamen for their wages, the plaintiff being one of the libellants.

If there be a special agreement, the plaintiff cannot recover upon a general count.

SUIT by a seaman for wages against the captain of the ship Governor Strong.

Mr. Youngs, for the plaintiff, offered to read the answer of the captain to the libel of the sailors in the Court of Admiralty, the present plaintiff being one of the libellants.

Admitted by the COURT. *KILTY*, C. J., doubting.

It appearing by the proceedings in the admiralty, that shipping articles had been executed, and the declaration being *indebitatus assumpsit* for work and labor, and *quantum meruit*, and no special count on the agreement,

The COURT (*nem. con.*) was of opinion that the plaintiff could not recover on this declaration, it being in evidence that there was a special agreement.

Leave to amend, on giving fresh security for costs, by first day of next term.

Nonsuit reinstated, with leave to amend.

HOOFF v. LADD.

If a tenant who has occupied and paid rent annually, holds over into a new year, it is evidence of a new demise for a year.

DEBT for rent — demise for one year.

The COURT was of opinion that although no special agreement was made about the rent, yet if the defendant had occupied and paid rent annually ; and had continued into a second year, it was evidence of a new demise for one year. So if he had paid rent monthly, it would be a demise for a month, &c.

BANK OF ALEXANDRIA v. HENDERSON.

The Bank of Alexandria, under its charter, had a right to have its causes tried at the first term to which the writ was returnable, if the note were made negotiable at the bank, and the writ was served ten days before its return day.

MOTION by *Mr. Simms*, for the plaintiff, to try the cause at the first term, and that the marshal return the writ.

Mr. Jones, for the defendant. The return day of writs by the rule of this Court, is the day after the last day of the term. The cause cannot be tried before the writ is returned.

(The writs are not made returnable to any particular day; but generally to the term.)

Mr. Simms. The intention of the act (the charter of the bank) is to give a speedy remedy. It requires (section 20) that an issue shall be made up and a trial peremptorily had at the first term, to which the writ shall be returnable, provided that the note be made negotiable at the bank; and the writ be served ten days before its return day.

Both motions were granted. The COURT being of opinion that they have a right to call upon the marshal now to return the writ; it being a necessary means of trying the cause.

BANK OF ALEXANDRIA v. JAMES WILSON.

The Bank of Alexandria, under its first charter, could maintain an action against an indorser of a note made negotiable in that bank, without first bringing suit against the maker.

WILSON was indorser of the note of Ricketts, Newton & Co. and Alexander Henderson & Co. The note was discounted at the Bank of Alexandria for the benefit of Alexander Henderson & Co.

Messrs. Taylor, C. Lee, and *Jones*, for the defendant, contended, That the provisions of the charter of the bank respecting summary judgments, applied only to the party who was the real debtor. That in Virginia the maker must be sued, &c., before resort can be had to the indorser. The Act of Assembly does not alter the general law of Virginia respecting promissory notes. If the charter meant that all the parties should be sued at the same time, it would have had words to that effect. In the act giving an action of debt on bills of exchange, such words have been used. The remedy is against the person indebted—the defaulter. The indorser does not become indebted until the insolvency of the maker is made to appear by suit, &c. The indorsement does not create the debt. In a suit upon the indorsement of a bond, the same remedy is given; bonds and notes are put upon the same footing by the act. The statute only provides a new remedy. It does not prescribe a new mode of creating a debt. The indorsement does not of itself make the indorser the debtor. The persons liable to this remedy must be indebted to the bank on bonds, bills or notes given or indorsed by them, with an express

consent in writing that they may be negotiable at the said bank, and must have refused to pay the same when due.

Mr. Simms, for the plaintiff. Every contract is to be carried into effect according to the intention of the parties at the time of contracting. That intention is shown by the general understanding and practice of persons dealing with the Bank of Alexandria, and of other banks. The charter is to be construed according to the intent of the legislature, to be collected from the whole act. The intent was to give a speedy remedy against the indorser as well as against the maker. The words of the charter are, "At the time the same may become due." If the indorser does not pay at that time he is liable to the speedy remedy. The debt arises at the time of indorsement. Kyd, 113, 114. Bonds would be on the same ground under this Act of Assembly, if the words "negotiable in the Bank of Alexandria," were inserted in them. The intention of the parties to the note and of the legislature in enacting the law, was that all the parties should be liable to the speedy remedy. The construction of the statute ought to be such as to remove the evil, and advance the remedy. A new remedy was not the only object of the legislature. They have prescribed the mode of creating the debt, by requiring the insertion of the words "negotiable at the Bank of Alexandria."

Mr. Swann, on the same side. It is said the law is unconstitutional; that by the bill of rights no exclusive privileges can be granted except for public services. This argument would go to destroy all the corporations in the State of Virginia, and would apply to all the cases of summary remedy given by statute, as in the case of sheriffs, landlords, judgments on motions, securities, fire insurance company, &c.

The bank itself is liable to the same short process. The preamble of the act is a key to its construction. The object is punctuality of payment. The words "indebted by bond, bill, or note given or indorsed," show that a person may become indebted by indorsement. If indebted by indorsement, at what time is that debt to be paid? The law says the action shall lie if the money is not paid at the time the same, that is the bond, bill, or note, shall become due.

Mr. C. Lee, in reply. The summary remedy was not necessary. It is a private institution, trading for its own benefit. The statute only provides a remedy; it does not alter the relative liability of the parties. It does not adopt the statute of Anne. It puts bonds, having the words, "negotiable at the Bank of Alexandria," on the same footing as notes. The case of *Lee v. Love*, 1 Call, 497, decides, that between private persons those words

United States v. Moses.

make no difference. As it respects the bank, it only gives the summary remedy, that is, a speedy trial.

The COURT was of opinion (*nem. con.*) that it was not necessary to bring suit against the maker of the note in order to create a right of action against the indorser. KILTY, C. J., said, "as it is in other cases."

CRANCH, J., said his opinion was made up on the ground that no case had yet been decided that an indorsed promissory note, payable to order, was not a negotiable note; or a bill of exchange; and that he was of opinion that, upon such a note, no suit was necessary against the maker, in any case, to support an action against the indorser.

LENOX & MAITLAND v. WILLIAM WILSON.

The indorser at Alexandria, of a foreign bill of exchange, to a merchant in New York, is only liable for damages according to the law in force in Alexandria.

THIS was an action by the holder against the indorser of a foreign bill of exchange, indorsed by the defendant in Alexandria, (where the damages fixed by law are ten per cent.) to the plaintiff, who resided in New York, where the damages were fixed by law at twenty per cent. The jury gave their verdict for the New York damages.

A motion by the defendant for a new trial, on the ground of excessive damages, was overruled by the Court, on the plaintiffs' releasing the difference, which was about 444 dollars.

Mr. Simms, for the plaintiff; *Messrs. E. J. Lee* and *C. Lee*, for the defendant.

UNITED STATES v. MOSES.

A witness is not bound to answer a question, the answer to which may tend to criminate himself.

Mr. E. J. Lee, for the United States, produced Billy, a witness. The confession of Moses had been given in evidence, that he bought the goods of Billy, (the goods having been proved to have been stolen.) The question was asked of Billy, whether he sold them to Moses. Objection by *Mr. Jones*, that it tended to criminate the witness.

The COURT sustained the objection.

Woodrow v. Coleman.

WISE v. DECKER.

Assumpsit will not lie at common law on a parol demise. The Stat. 11 G. 2, c. 19, is not in force in Virginia.

ASSUMPSIT for rent, on a parol demise. Demurrer to 1st count.

Mr. Taylor and *Mr. Jones*, for the defendant. Assumpsit will not lie at common law for rent on a demise. 11 Geo. 2, c. 19; Esp. N. P. 20; 4 Bac. Ab. 366; *Chapman v. Southwicke*, 1 Lev. 204; *Johnson v. May*, 3 Lev. 150; *Dartnal v. Morgan*, Cro. Jac. 598; *Clerk v. Palady*, Cro. Eliz. 859; 2 Blk. Com. 41; Co. Lit. 141 (6). There must be a special and collateral promise. *Reade v. Johnson*, 1 Cro. Eliz. 242; *Symcock v. Payn*, Cro. Eliz. 786; *Slack v. Bowsan*, 2 Cro. 668; *Brett v. Reed*, 3 Cro. 343; *Acton v. Symon*, Cro. Car. 414; *Ashbrooke v. Snape*, 1 Cro. 240.

The Stat. 11 Geo. 2 was made to remedy this inconvenience; but that statute is not of force in Virginia.

Mr. Young, for the plaintiff, cited *Dartnal v. Morgan*, 2 Cro. 598; 4 Bac. Ab. 366; *Hunt v. Sone*, 1 Cro. 118.

The count was adjudged bad by the COURT, *nem. con.*

WOODROW v. COLEMAN.

The father of an apprentice who binds himself, is liable upon the indentures, by reason of his signature and seal, although there be no express words of covenant binding the father.

COVENANT against the father on articles of apprenticeship of the son, the boy having run away. Oyer and general demurrer to the declaration.

Mr. Taylor, for the defendant, contended that the signature and seal of the father, is only evidence of his consent. As there are no words in the indenture to bind the father, no action can be maintained upon it against him. Co. Lit. 172; *Evelyn v. Chichester*, 3 Burr. 1719; Old Rev. Code of Virginia, c. 95, § 15; *Maddon v. White*, 2 T. R. 161; *Rex v. Hindringham*, 6 T. R. 557.

Mr. Swann, contrà. By the law of Virginia, a father may bind his child, and the father is liable if the son embezzles the master's money. It is upon the faith of this that the master takes the apprentice. A father has a right to bind the son without his consent. The father might have brought an action against the master

upon this indenture. The words are, "the said parties bind themselves each to the other." 3 Bac. Ab. 547; *Gylbert v. Fletcher*, Cro. Car. 179; *Whitley v. Loftus*, 8 Mod. 191; *Branch v. Ewington*, Doug. 518.

Judgment for plaintiff on the demurrer.

CIRCUIT COURT OF THE UNITED STATES.

JULY TERM, 1804, AT WASHINGTON.

JAMES McCUTCHEM *v.* NICHOLAS HILLEARY.

The defendant may require security for costs, from a plaintiff who has removed from the district since the commencement of the action.

ASSAULT AND BATTERY. The defendant stated that since the bringing this suit the plaintiff had removed from the district to Philadelphia, and has there fixed his residence, &c.

Motion by the defendant's counsel to lay a rule on the plaintiff to give security for costs.

Granted. KILTY, C. J., doubting.

DAVIS, COPE *et al.* *v.* JAMES MARSHALL.

A defendant, discharged under the insolvent law of Pennsylvania, may appear here and discharge an attachment without giving special bail.

ATTACHMENT of goods under the Act of Assembly, 1795, c. 56.

Mr. Mason, for the defendant, moved to appear without bail, so as to discharge the attachment. The debt was contracted in Maryland. The defendant removed to Pennsylvania, where his creditors arrested him, and he was released under the insolvent law of Pennsylvania. The plaintiffs sued in the General Court of Maryland. On producing the discharge, the General Court admitted an appearance without bail; and the plaintiffs struck off the suit there, and laid this attachment in the District of Columbia.

Mr. Morsell, for the plaintiffs, objected, 1st. That the Act is not in force in this district. 2d. That the defendant cannot dissolve the attachment without giving bail.

The COURT permitted defendant to appear on filing common bail.

CRANCH, J., did not sit in this case.

UNITED STATES v. WILLIAM SQUAUGH.

Selling less than a pint, under a license to sell not less than a pint, is selling without license.

INDICTMENT for selling less than a pint of whiskey.

The defendant produced a license to retail not less than a pint.

Not permitted to be given in evidence. Fined \$16 under the Act of 1784, c. 37, § 4, and not 600 pounds tobacco under the Act of 1780, c. 24, § 11 — it being a retailing without license.

DEVIGNY v. MOORE.

After the term at which a rule was laid upon the plaintiff to give security for fees, the clerk, upon a motion for judgment on the rule, need not prove the plaintiff to be a non-resident.

THE rule on the plaintiff to give security for fees, was laid at the last term. The clerk, at this term, moved for *non pros.* on the rule.

Mr. Peacock, for the plaintiff, contended that the clerk must show that the plaintiff lives out of the county.

But the COURT (*nem. con.*) ordered the *non pros.* to be entered, unless the plaintiff should prove his residence within the county.

UNITED STATES v. STUART WILLIAMS.

There cannot be an accessory at common law to an offence which does not amount to a felony.

INDICTMENT for feloniously receiving, harboring, and maintaining one Daniel Hennessee, who had been convicted, under the Act of Congress of 1790, [1 Stat. at Large, 112,] of stealing a pair of silver candlesticks. The indictment did not state that Hennessee had been convicted of feloniously stealing.

Motion in arrest of judgment. 1. Because it does not appear in the indictment that D. Hennessee was convicted of any felony, but only of a misdemeanor, and there could be no accessory to the offence of which Hennessee was convicted. 2. That D. Hennessee, the principal is stated to have been convicted of stealing one pair of candlesticks, one saddle, and one bridle. Whereas the record and conviction, produced in evidence, only find him

guilty of stealing the candlesticks, and not the other articles charged in his indictment.

Mr. P. B. Key, for the defendant. 1. *D. Hennessee* was convicted of a trespass only, under the Act of Congress. And although the act gives an indictment against accessories after the fact, yet *Williams*, not being indicted under the statute, cannot be punished under the statute. The indictment against *Hennessee* does not state the act to have been done feloniously. Where the indictment does not state the act to have been done feloniously, it is only a trespass: 4 Tuck. Bl. 306. No circumlocution can supply the word feloniously, (*felonice*.) 2 Hawk. 320. *Hennessee* is only charged with an offence which is a trespass at common law. It is said that felony is derived from *fee*, which signifies the feud or land, and *lon*, forfeiture. Hence, felony is a crime which forfeits land. Cr. Cir. Comp. 95, 96, 104, 6th edition. This indictment against *Hennessee*, is a good indictment under the Act of Congress. At common law, there can be no accessory after the fact, except in felony. 4 Tuck. Bl. 37, 38. And the felony must be completed at the time the assistance is given. [1 Stat. at Large, 114.]

The indictment against *Williams* is not under the statute. The statute has made it less than felony; it gives no forfeiture of lands or goods. The indictment against *Williams* is at common law, and states that *Williams*, well knowing that *Hennessee* had committed the said theft, &c. 4 Tuck. Bl. 37, 38. If indicted at common law, he cannot be punished under the statute. The statute judgment cannot be given upon a common law indictment. 2 Hawk. 357. Where clergy is taken away expressly by any statute, the offence must be laid in the indictment against that very statute, and the words of it, or the offender shall have his clergy. 1 H. H. P. C. 529; Foster, 356, 357; Kel. 104. See Cr. Cir. Comp. 412, Larceny.

Mr. Mason, Attorney for the United States. The Act of Congress speaks of it as a felony, "larceny aforesaid." Stealing is felony at common law. The facts stated in the indictment against *Hennessee* amount to felony. It was not necessary, in the indictment under the statute, to charge the act to have been done "feloniously," to obtain a judgment under the statute. Every offence which produced a forfeiture of lands or goods, was, at common law, a felony. It is sufficient to show, that *Hennessee's* offence was felony at common law. The jury say he did feloniously harbor, and receive, &c. It is a good indictment under the statute, though not *contra formam statuti*. Cr. Cir. Comp. 412.

As to the second point, the variance between the allegation and the evidence; it ought to have been made at the trial. It is now too late.

Pancoast v. Barry.

Mr. Key. The United States may waive the felony, and indict for the trespass. The Act of Congress makes it an intermediate offence between trespass and felony. It is the punishment only that makes a felony. The Act of Congress gives this Court the power to punish it more severely than if it was a mere trespass, and not so severely as by common law. The Act of Congress is not to be lightly construed to create a felony.

Judgment arrested. Because the indictment against the principal did not charge him with a felony.

KILTY, C. J., absent.

 PANCOAST v. BARRY.

In ejectment, plats are part of the pleadings ; in trespass they are evidence only. Upon the plea of not guilty, in trespass *quare clausum fregit*, and notice of "defence on warrant," the defendant may give his title in evidence as a justification, without pleading it specially.

A person interested in supporting a particular location, is not a competent witness to prove it.

All locations not counter-located are admitted to be correct.

When a boundary is proved, course and distance must yield to it.

TRESPASS *quare clausum fregit* ; not guilty ; defence on warrant ; plats, deposition, and accounts filed ; leave to add and amend.

The defendant had a new location and plat of a contiguous tract made by the surveyor, since the last term, under leave to add and amend, thirty days' notice having been given to Pancoast.

Mr. Gantt, for the plaintiff, moved for a continuance, on the ground of its being an important amendment on the part of the defendant, which would require time to consider and plead.

Mr. Mason and *Mr. Key* stated that, in ejectments, the locations of the pretensions of the parties are considered as part of the pleadings, the *allegata* ; but that locations of adjacent lands, for illustration, are to be considered as matter of evidence, *probata*. But this is an action of trespass. All plats taken in an action of trespass are for illustration, and are matters of evidence ; it is therefore like the taking of a deposition ; notice was duly given to the opposite party. He had time to collect counter evidence, if he pleased.

Upon the trial, *Mr. Woodward*, for the plaintiff, moved to strike out "defence on warrant," and contended that if the defendant means to rely on title as a justification, it must be specially pleaded.

Messrs. Mason and *Key*, for the defendant.

The words, "defence on warrant," are only to give notice of the nature of the evidence intended to be produced.

The plea is, not guilty. Upon the trial of that issue, if the plaintiff should object to the evidence, that will be the time to consider it. It has been the uniform practice in Maryland to try the title on the general issue, after giving notice in this form.

And of this opinion was the COURT. KILTY, C. J., absent.

H. Selby was called by the plaintiff to prove the declarations of a Mr. Bean, who is dead, as to the 2d boundary of 1st line of St. Elizabeth, and that it was some distance westward of the place alleged by defendant; but it appearing that Bean was the owner of an adjoining tract, which would be injured by the defendant's location, the COURT refused to admit his declarations to go in evidence.

Afterwards, the defendant having given the declarations of the same Mr. Bean in evidence, in support of his location, the COURT permitted the plaintiff to give evidence of Bean's declarations to the contrary. For if Bean had himself been introduced as a witness for the defendant, it would be competent to give his contrary declarations to others at different times, in evidence, to discredit him, and his declarations cannot be better evidence than his testimony upon oath.

Mr. Key moved the Court to instruct the jury that all locations made by either party and not counter-located by the opposite, are admitted to be correct.

Mr. Woodward contended that his client not having in fact attended, although he had notice, was not bound by the plats.

The COURT gave the instruction as prayed. It was admitted, that where a boundary is called for and proved, the course and distance must conform, although thereby it varies from the course and distance stated in the grant.

TIBBS & Co. v. PARROTT.

When an action is brought in the name of a mercantile firm, the Court will suffer the declaration to be amended by inserting the names of the several persons who compose the firm.

Mr. Swann, for the plaintiffs, moved to amend the declaration by specifying the names of the company.

Mr. Mason asked if there was any thing to amend by, and cited the cases of *Nicholls v. Harrison*, decided at December term, 1802, (not reported,) which was a refusal by the COURT (MARSHALL, J. and CRANCH, J. against the opinion of KILTY, C. J.) to allow *covenant* to be changed to *case*, or *case* to *covenant*.

The COURT (*nem. con.*) allowed Mr. Swann to amend, it being a

United States v. Williams and Ray.

different amendment from the one mentioned by Mr. Mason, and not changing the cause of action ; but the COURT expressed an unwillingness to extend the rule further than it had been.

CLEMENTSON v. F. BEATTY, JR.

If the contract was with the defendant and another as joint partners, the defendant cannot take advantage of it but by plea in abatement.

ASSUMPSIT for goods sold and delivered.

Mr. Mason objected that the goods were delivered to Fisher & Beatty jointly as partners.

Mr. Swann contended that he could not take advantage of this on the general issue, and cited the case of *Rice v. Shute*.

CRANCH, J., stated that he considered the principle to be laid down generally, that where a partnership was alleged by the defendant, he must plead it in abatement, and name all the partners.

Mr. Mason abandoned the point.

UNITED STATES v. PHILIP WILLIAMS and JACOB RAY.

A prisoner, indicted for counterfeiting a note of the Bank of the United States, is not entitled to a list of witnesses and jurors two days before pleading, although the statute makes it felony.

A witness may be allowed his fees although not regularly summoned.

THE prisoners being brought up to be arraigned for counterfeiting a bank-note of the United States for fifty dollars, —

Mr. Key, counsel for the prisoner, observed that the Act of Congress [1 Stat. at Large, 573,] has made it felony, and the Act of 30th of April, 1790, § 29, [*ut sup.* 118,] entitles the prisoners to a copy of the indictment and a list of witnesses in all capital cases. Every felony at common law is a capital offence. He therefore demanded for the prisoners a list of witnesses and jurors, and a copy of the indictment two days before pleading.

Mr. Mason denied that Congress, by making it felony, had made it a capital offence. It was not a felony at common law, and the Act, at the same time that it makes it a felony, prescribes a punishment less than death.

THE COURT (KILTY, C. J., absent,) was of opinion, that the prisoners were not entitled, under the Act of Congress of 30th of April, 1790, § 29, [1 Stat. at Large,] to a list of witnesses, jurors, &c., but ordered them to be furnished with a copy of the indict-

 Beale v. Voss.

ment, and gave them reasonable time to plead. A witness from Philadelphia, who was not summoned, was allowed to prove his attendance to testify to the grand jury in this case, having been requested by the Attorney for the United States to attend.

A *venire facias* was ordered for the 3d Monday in September.

THOMAS MOORE v. NICHOLAS VOSS.

Bankruptcy of the plaintiff cannot be proved by parol.
If the original entries are lost, a copy may be given in evidence.

ASSUMPSIT for goods sold and delivered.

Mr. Hewitt, for the defendant, offered parol evidence to prove the bankruptcy of the plaintiff and assignment of his effects, to show that the plaintiff could not maintain the action. Refused.

At the prayer of the defendant's counsel, the COURT (KILTY, C. J., absent,) gave the following direction to the jury: — That if they should be of opinion, from the evidence, that the book produced is the original entry of the sale and delivery, or if they should be of opinion, from the evidence, that a former entry had been made, but that the same is now lost or destroyed, and that this book was truly copied from the original entry by the witness, then this book is evidence; but if they should be of opinion that prior entries exist which are not produced, then this book is not evidence. Peake, L. E. 136; *Church v. Perkins*, 3 T. R. 749.

THOMAS K. BEALE v. NICHOLAS VOSS.

If the verdict be reduced below twenty dollars by account in bar, there must be judgment of *non pros*.

ASSUMPSIT for work and labor; an account in bar given in evidence; verdict for 45 cents; motion for *non pros*. See Maryland Laws, 1785, c. 46, § 7; November, 1785, c. 87, § 2; 17 November, 1791, c. 68, § 9.

Mr. Mason, for the defendant, and *Mr. Key*, for the plaintiff, admitted, that by the law, in Maryland there should be a *non pros*.

Non pros. entered at December term, 1804.

KILTY, C. J., absent.

 Cawood, Executor v. Nichols.

THOMAS MOORE, use of W. Oxley, v. HENRY DUNLOP.

A writ of error is not a *supersedeas* unless a copy of the writ be filed in the clerk's office for the adverse party, according to the 23d section of the Judiciary Act of 1789.

MOTION to quash the execution, it having issued before mandate, and after writ of error filed and citation issued.

The judgment was rendered on the 6th of January, 1804. The writ of error was filed on the 13th of January. The bond and citation were filed in Supreme Court office on the 14th of January. The execution issued on the 2d of July, 1804, and the mandate was filed on the 7th of August, 1804. See the Acts of 1789, Sept. 24, [1 Stat. at Large, 73,] § 22, and 27 Feb. 1801, § 8, [2 Stat. at Large, 106.] No copy of the writ of error was filed in the clerk's office for the adverse party, according to the 23d section of the Judiciary Act of 1789, [1 Stat. at Large, 85,] and on that ground the COURT refused to quash the execution.

KILTY, C. J., absent.

 CAWOOD, Executor of Blacklock, v. EDWARD NICHOLS.

The declaration need not state by whom the letters testamentary were granted.

DEMURRER to the declaration, because it does not state by whom letters testamentary were granted. *Cur. ad. vult.* See *Chiberton v. Trudgeon*, Cro. Jac. 556, which seems in support of the demurrer. *Quære*, whether there is not a difference between letters testamentary and letters of administration. See *Graysbrooke v. Fox*, Plowden, 279; *Temple v. Temple*, Cro. Eliz. 791; *Morgan v. Williams*, Cro. Eliz. 431; and *Gidley v. Williams*, 1 Salk. 38; which is strong in support of the demurrer as to letters of administration. Executors are by will, not by the ordinary. None of the forms of declarations by executors state by whom the letters testamentary were granted; but all the forms by administrators state by whom they were granted.

"The right of action is in him before probate, for that gives him no interest; but the right he hath is by virtue of the will." Swinburne on Wills, 434, cites *Russet's case*, 5 Rep. 27, and 1 Inst. 292.

"He cannot have an action unless he prove the will before he declares. If the action be brought before probate; if he concludes his declaration with a *profert hic in curia literas testamentarias*, it is well enough." Id.; cites *Duncomb v. Walter*, 1 Vent. 370; Raym. 479; S. C. 3 Lev. 57.

“If a man have goods in divers dioceses or provinces, and makes his executor of his goods in one of the provinces, and dies intestate as to his other goods: if the ordinary commit administration of the goods, which are in the other province, to the said executor, then is he both executor and administrator, and the party died both testate and intestate.” Swinburne, 440, 441; 35 H. 6, fol. 36.

CRANCH, J., after mentioning the above authorities, said, “upon the whole, and upon examination of precedents, I am of opinion that the declaration is sufficient.”

The COURT, at December term, being of the same opinion, advised the defendant to withdraw the demurrer, which he did, and confessed judgment.

TALBOT, Administrator of Robinson, v. SELBY.

In an action by an administrator of an insolvent estate, it is not a good objection to the plaintiff's witness that he is a creditor of the intestate, although that circumstance may affect his credit.

A declaration in general *indebitatus assumpsit* for one thousand dollars, for sundry quantities of cattle sold and delivered, is not supported by evidence of a special contract to sell and deliver four yoke of steers at a certain price for each yoke; and a delivery of the cattle under the agreement.

INDEBITATUS ASSUMPSIT for one thousand dollars for sundry quantities of cattle sold and delivered at defendant's request. The evidence offered was an agreement to sell and deliver to the defendant four yoke of steers, at a certain price for each yoke, amounting in the whole to less than one thousand dollars; and a delivery of the cattle under the agreement.

James Harrison, a witness for the plaintiff, having been sworn and examined, and it appearing that he was a creditor of the intestate, and that the estate was insolvent, *Mr. Mason*, for the defendant, objected to the competency of the witness.

The COURT stopped *Mr. Key* from replying, and said that the interest was too remote to affect his competency, but that it was a circumstance which might affect his credit.

Mr. Mason prayed the COURT to instruct the jury, “that if, from the evidence given, they are satisfied that there was a special contract made between the intestate and Henry Selby to purchase and sell four yoke of steers, at a particular price between them settled and agreed upon, for each yoke of the steers so contracted for, the price of each yoke being different the one from the other; or that if, from the evidence given in this cause, the jury shall be satisfied that by the contract between the intestate and

the defendant a permission or license was given by the intestate to the defendant to take four yoke of steers, then the property of the intestate, at a certain stipulated price by the intestate fixed upon each yoke of the said steers, and that in pursuance of that permission and license the defendant did afterwards take the said steers, that evidence of either of such contracts is not competent in law to sustain either of the counts in the plaintiff's declaration, and that therefore they ought to find for the defendant."

Mr. Key contended that when there is a special contract, and the plaintiff has performed his part, he may maintain a general *indebitatus assumpsit*; or, in other words, that the duty having been performed, the law raised the promise; and cited the case of *Hannah v. Lee*, in the Court of Appeals of Maryland, June term, 1804, in which the court said that "whenever the plaintiff has performed his part of the contract, or has been prevented by the defendant from performing it, an *indebitatus assumpsit* will lie."¹

The COURT gave the instruction as prayed by *Mr. Mason*.

KILTY, C. J., absent.

Mr. Key had leave to amend on continuance and costs. *Mr. Key* afterwards obtained a rule to show cause why the costs of this term should not await the issue of the cause, on the ground of the misdirection of the court.

Mr. Key. There are two kinds of *assumpsit*, a general *indebitatus*, and a special *assumpsit*. Bull. N. P. 182; Impey, 171; *Moses v. Macferlan*, 2 Burr. 1005; *Slade's case*, 4 Co. 92. The old strictness of pleading has been much relaxed. *Gordon v. Martin*, Fitz-Gibbons, 303, recognized in Bull. N. P. 139; *Walker v. Witter*, Doug. 1. Upon parol contracts, it is almost impossible

¹ The following note of that case was handed to the Court:

JOHN HANNAH	}	Court of Appeals, June term, 1804.
v.		
THOMAS LEE,		

In this case, the Court of Appeals, concur with the General Court, and therefore affirm the judgment. As a general proposition, they think the law declared in this direction, correct, but they are of opinion that the general rule admits of exceptions, and that if the evidence offered on the part of the plaintiff was credited by the jury, it brought the plaintiff's case within one of the exceptions to the general rule. In the case of a continuing contract, as the original contract proved between the parties, if that contract had not been waived, and a new one proposed and acceded to, the plaintiff could not support general *indebitatus assumpsit*, but if the waiver of the original contract had appeared to the jury, and the second contract set up had been proved to their satisfaction, to wit, the covering in of the house, we should have been of opinion, that after the completion of such second contract by the plaintiff, (if that was the case,) the plaintiff might well have supported his general *indebitatus assumpsit*.

to state precisely the terms of a contract exactly as they shall turn out in evidence. In general *indebitatus assumpsit*, you may recover less than you count for. Impey, 172, 200.

Mr. Key, also, cited the following authorities: *Esp. N. P.* 130, 138, 140; *Rolleston v. Hibbert*, 3 T. R. 412; *Cates v. Knight*, 3 T. R. 444; *Cutter v. Powell*, 6 T. R. 320; *Payne v. Bacomb*, Doug. 651; *Robinson v. Bland*, 2 Burr. 1077, 1078; *Prec. Dec.* 18, 19.

The COURT, however, remained of the same opinion, after consulting the following authorities: *Seward v. Baker*, 1 T. R. 616; *Esp. N. P.* 130; *Weston v. Downes*, Doug. 24; *Towers v. Barrett*, 1 T. R. 134; *Touissant v. Martinnant*, 2 T. R. 104; *Esp. N. P.* 138; 1 *Ld. Raym.* 735, Anon.; *Hockin v. Cooke*, 4 T. R. 314; *Bull. N. P.* 145; *Churchill v. Wilkins*, 1 T. R. 449; *Esp. N. P.* 140; *Cutter v. Powell*, 6 T. R. 320; *Duncomb v. Tickridge*, Ayleyn, 94; *Baker v. Edmonds*, Ayleyn, 29; *Janson v. Colomore*, 1 *Rol. Rep.* 396; *Buckingham v. Scott*, 2 *Keble*, 240; *Milward v. Ingram*, 2 *Mod.* 43; *Gordon v. Martin*, *Fitz-Gibbons*, 303; *Baker's case of Gray's Inn v. Occould*, *Godbolt*, 186; *Holme v. Lucas*, *Cro. Car.* 6; *Cook v. Sambrune*, 1 *Sid.* 122; 1 *Viner*, 360; 1 *Com. Dig.* 193; *System of Pleading*, 104; *Gilbert*, L. E. 188; *Godbolt*, 154; *Child v. Guiat*, *Styles*, 243; *Giles v. Edwards*, 7 T. R. 181; *Barker v. Sutton*, *Trials per pais*, (3 edit.) 186; *Franklin v. Walkens*, *Ib.* 187; *Old Law of Evidence*, 158, 160, 165, 166; *Cheney v. Hawes*, *Moore*, 466; *Tissard v. Warcup*, 2 *Mod.* 280; *Gilbert's Law of Evid.* 189, &c.; *Trials per pais*, 504; *Mustard v. Hopper*, *Cro. Eliz.* 149; *Lee v. Adams*, 3 *Bulstrode*, 35; *Revere v. Baptista*, *Moore*, 470; *King v. Robinson*, *Cro. Eliz.* 79; *Bagnal v. Sacheverall*, *Cro. Eliz.* 292; *Munday v. Martin*, *Cro. Eliz.* 660.

Rule discharged.

At the December term, 1804, the cause was tried upon the amended declaration, and a verdict rendered for the plaintiff for \$116.50.

JONES v. LOVELL.

The testimony of the subscribing witness may be dispensed with if he is absent from the country.

ASSUMPSIT on promissory note. The note was not suffered by the Court to go in evidence to the jury; not being proved by the subscribing witness, and the absence of the witness not accounted for.

The plaintiff then offered evidence to prove that the subscribing witness was a resident of this district some few years ago, and

that he went off in a clandestine manner, to avoid the payment of his debts, and proved by many witnesses that they did not know, nor believe that he was now residing in the District of Columbia, or within the reach of the process of this Court, and having proved the handwriting of the subscribing witness, and of the defendant, the COURT permitted the note to go to the jury. *Prince v. Blackburn*, 2 East, 250, and *Cunliffe v. Seston*, 2 East, 183.

The following were the grounds upon which the Court decided the case :

The only reason why those cases should not apply to this country, is, that here we may issue a commission to examine witnesses resident abroad. But the answer to that objection is, 1st, That in this case it was not known where the subscribing witness resided ; and therefore it was impossible to know where to send a commission. 2d, That upon such a commission the plaintiff could not compel the subscribing witness to testify. 3d, That the plaintiff ought not to be compelled to send his original security abroad, and run the risk of its loss. 4th, That if the defendant wished to avail himself of the evidence of the subscribing witness he might summon him or take his deposition. 5th, That the rule was a hard one, particularly with regard to negotiable paper, and the Court would not extend it beyond the cases already decided. The reason why the testimony of a subscribing witness is required, is because the best evidence which the circumstances of the case admit ought to be produced. And the reason of that rule is because the not producing such evidence, raises a presumption that if produced it would make against the party who ought to produce it. But the circumstances of this case do not admit of the production of the testimony of the subscribing witness ; and they do sufficiently account for its non-production. This destroys the presumption arising from the want of that testimony, and thereby removes the ground upon which the rule was founded.

MACUBBIN v. LOVELL.

Comparison of handwriting is not evidence.

Mr. Peacock, for the plaintiff, having proved that on a note filed in another case the plaintiff had confessed judgment, prayed the Court to suffer the jury to compare a receipt purporting to be signed by the plaintiff with the said note and from thence to infer that the signature was in his handwriting.

Refused. . KILTY, C. J., absent. See *Peake's L. E.* 68, 69, 70. *S. P. Watterstone v. Cook*, at the same term.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1804, AT ALEXANDRIA.

UNITED STATES *v.* WILLIAM AUBREY.

Upon an indictment for disturbing a religious congregation, the punishment is fine and imprisonment, to be assessed by the jury.

INDICTMENT for disturbing the religious worship of a society of Methodists, under the 4th section of the Act "for the effectual suppression of vice," &c., passed 26th December, 1792. Old Rev. Code, p. 287, New Rev. Code, p. 276; by which if any person shall maliciously disturb any congregation, assembled in any place of religious worship, he may be put under restraint during religious worship by any justice present, who may cause the offender to find two securities for his good behavior, and in default thereof shall commit him to prison, there to remain until the next court, "and upon conviction of the said offence before the said court, he shall be further punished by imprisonment and amercement at the discretion of a jury."

Mr. Jones, Attorney for the United States, contended that the jury were to assess the fine and imprisonment, that both species of punishment must be applied, and both must be at the discretion of a jury. (See the case of *United States v. M'Farlane*, at last term, *ante*, 163.) By the Act of 13th November, 1792, § 26, Old Rev. Code, p. 112, it was enacted that in every indictment for a trespass or misdemeanor, the fine or amercement shall be assessed by a jury.

The COURT were of opinion that imprisonment was a necessary part of the punishment, and that the jury were to ascertain the term of imprisonment, as well as the fine.

FITZHUGH, J., *contrd.* The 4th section of the Act "for the effectual suppression of vice," &c., after stating the power of a justice of the peace to bind the offender to appear at the next court, &c., says, "and upon conviction of the said offence before the said court, he shall be further punished by imprisonment and amercement at the discretion of a jury." Imprisonment has always been imposed by courts, and amercements by juries, in Virginia. Old Rev. Code, p. 112, § 26. It is improper so to ex-

Ex parte Walton.

pound a law as to make it repeal another by implication. The meaning of the act is that a jury shall decide on the defendant's guilt and his fine; and if, from the atrocity of the offence, the court should think the further punishment of imprisonment proper, another jury fixes the period. The words "upon conviction," and "further punished," show that the same jury that ascertains the guilt do not imprison. The words "further punished" are accumulative. "Conviction means that the defendant's guilt is to be ascertained by verdict, and as this conviction is to precede the 'further punishment,' &c., it follows that the defendant is not to be imprisoned under the first verdict. By this construction the defendant will be punished as in the case of trespasses and misdemeanors in general."

The indictment also contained counts for a rescue, and for beating Abercrombie, the constable.

Verdict guilty, on all the counts. The jury assessed the fine at twenty-five cents, and the term of imprisonment at three calendar months.

UNITED STATES v. GREENWOOD.

After verdict, in assault and battery, the Court will permit the defendant to give security to abide the judgment. If the jury, after retiring, come into court to ask questions of a witness, the counsel will not be permitted to interrogate the witness.

ASSAULT AND BATTERY. The defendant was surrendered before trial by his bail and committed; after verdict he offered to give security for fine and costs, and for abiding the judgment.

Mr. Jones, for the United States, objected on the ground of his being in custody. But the COURT overruled the objection.

The jury, after retiring, were brought into court at their request, for the purpose of asking some questions of a witness. The Court refused to suffer the counsel to interrogate the witness.

(Judge Fitzhugh's Notes.)

Ex parte WALTON.

Five years continued residence was necessary under the naturalization law of 1802.

APPLICATION to be naturalized. Affidavit that "he has resided within the United States upwards of six years, that during that period he was absent a short time upon business, but left his family in the United States. That he hath resided for more than one year last past in Alexandria, in the District of Columbia, and that

during all the aforesaid time he has behaved as a man of a good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. That the said Walton removed to the United States, as this deponent understood, and doth verily believe, with the intention of making the said States his place of permanent residence, and that he hath not relinquished that intention."

The application was objected to, and rejected by the COURT, because the residence did not appear to be a continued residence, and the term of absence was indefinite, and the Court had also seen another affidavit, by the same deponent, stating that Walton last returned to the United States on the 20th day of May, 1804, which was inconsistent with the present affidavit.

SUTTON v. JOSEPH MANDEVILLE.

The defendant has not a right to open the cause in all cases where he holds the affirmative of the issue.

Malice may be given in evidence in aggravation of damages in an action upon a bond conditioned to prove the plaintiff a bankrupt.

Evidence cannot be given to show that the commissioners of bankruptcy erred in their judgment.

DEBT on bond conditioned to prove plaintiff a bankrupt. Plea, conditions performed. Replication. Breach, that defendant did not prove plaintiff to be a bankrupt. Rejoinder, that he did prove him to be a bankrupt. Surrejoinder, that he did not; and tenders issue. Rebutter, joins the issue.

Mr. Swann, for the defendant, contended that he had a right to open the cause, because he held the affirmative, to wit: that he did prove plaintiff a bankrupt.

The COURT, however, refused to permit him, because the replication is in nature of a new declaration; and the rejoinder is only a denial of the fact charged in the replication.

CRANCH, J., *contra*, because the defendant is entitled to show that he did prove the plaintiff to be a bankrupt, and it is only upon the supposition that he has failed to support the issue on his part, that the plaintiff can consistently introduce evidence of the damages sustained by him.

Mr. C. Lee, for the defendant, as this was not an action for a malicious prosecution, prayed the opinion of the Court whether the plaintiff had a right to give evidence of malice in aggravation of damages.

The COURT said that the question was premature, until evidence of malice should be offered, when it might come properly before

the Court on an objection to the evidence. But the COURT permitted the plaintiff to give evidence of fatigue, trouble, vexation and expenses occasioned by the attempt to prove him a bankrupt. And afterwards permitted the plaintiff to go into evidence of malice in aggravation of damages.

The COURT also permitted the defendant to give evidence of the circumstances and conduct of John Sutton, which would have amounted to acts of bankruptcy, if he had been a proper subject of the bankrupt law, in mitigation of damages and to repel the suggestion of malice. But refused to admit evidence that the commissioners of bankruptcy had erred in their judgment.

GILL v. PATTON.

In an action of covenant for rent, the landlord cannot recover interest.

WRIT of inquiry, upon a judgment on demurrer in an action of covenant on a lease; breach, not paying rent.

Mr. C. Lee, for the defendant, contended that as the landlord has a summary process to compel payment, he is not entitled to interest.

Mr. Youngs. The action is covenant and sounds in damages, and the jury alone can assess them.

The COURT instructed the jury that they were as much bound to give interest on the arrears of rent as on any other debt by specialty; that it is in the power of the jury to refuse interest; and if they refuse, it is in the power of the Court to grant a new trial.

Verdict for plaintiff, including interest.

A new trial was afterwards granted on the ground of misdirection of the jury by the Court.

MCCALL v. EVE; and MCCALL, *qui tam*, v. EVE.

A master of a vessel is not liable to the penalty of the Act of Virginia for carrying a slave out of the Commonwealth, unless he did it knowingly.

CASE, for carrying away a slave whereby the plaintiff lost his service; and debt, under the Act of Virginia, of 17th December, 1792, Rev. Code, (P. & P. Ed.) p. 192, for three hundred dollars penalty for carrying away the same slave.

Both actions were tried at the same time by the same jury.

Question — Whether the master of the vessel is liable to the penalty, if he did not know that the slave was on board at the time he sailed?

The facts were that the slave secreted himself in the fore-castle, and was not discovered for five or six hours after the vessel had sailed; the captain landed him at St. Mary's, in Maryland, and lodged him in jail; and wrote to the owners of the vessel requesting that information might be given to the master of the slave.

Mr. Simms, for the defendant. No offence can be committed unless the party to be charged has knowledge of the fact constituting the offence. This case is not within the letter or spirit of the law; not within the letter, because the captain did not carry the slave; the vessel carried the slave; and the carrying cannot be attributed to the captain unless it was with his knowledge.

And of this opinion were KILTY, C. J., and CRANCH, J.

FITZHUGH, J., *contra*. The legislature intended to excite vigilance in captains. Though this subject has been repeatedly before them, and this law has been reenacted, they have never made a knowledge in the exporter necessary to constitute an offence; and yet on the same subject, when speaking about harboring slaves, it is no offence without knowledge. This discrimination shows their intention. The same idea may be collected from Acts of Congress, which in the enacting part, subject a captain to a penalty for having contraband goods, but there is a provision expressly requiring that he should know, &c. If knowledge was always necessary to constitute an offence, why introduce this protective proviso? The proviso proves that the legislature supposed that the bare finding contraband goods would be conclusive evidence. But another reason why I suppose the Act of Assembly should be construed literally, is that slaves constitute a large proportion of our property, disposed to escape from our possession; and a disposition having been discovered in captains of vessels to aid them in their attempts, it was found necessary to impose severe penalties.

In expounding statutes, the meaning of the legislature is to be ascertained, if possible, and the mischief defeated. The mischief intended to be remedied, was that seafaring men would secretly remove or countenance the escape of slaves without the knowledge of the owner, when it would be difficult, if not impossible, to prove that the captain took the slave on board, or knew of it. If it was necessary expressly to prove the captain's knowledge, this offence would generally pass unpunished. The defendant, after discovering he was on board, should have landed him in Virginia, where he could not have claimed his freedom by removal. Stafford, King George, or Westmoreland, were as convenient as St. Mary's. The Act of Assembly makes it necessary that the owner's consent should be had; the captain should therefore have

seen to that ; he ought not to presume the negro to have been free. Color and law forbid it.

MASON'S ADMINISTRATORS v. LAWRASON & SMOOT.

Although the plaintiffs name themselves administrators, yet if they have not made *profert* of their letters of administration they are not bound to give oyer of them. The Act of Congress respecting the authentication of the records of State courts does not apply to records of the courts of the United States.

ACTION on a contract made with the administrators and not with the intestate, but the plaintiffs named themselves administrators, and did not make a *profert* of their letters of administration. A rule had been laid upon the defendants to plead. They prayed oyer of the letters of administration, and cited *Theobald v. Long*, Carth. 453, and *Adams v. Savage*, 6 Mod. 134. The plaintiffs refused to give oyer.

Mr. Taylor, for the plaintiffs. *Mr. Swann*, for the defendant.

The COURT decided that they were not bound to give oyer, because there was no *profert* ; because oyer is not demandable after the first term ; and because the plaintiffs did not sue in the right of their intestate, but in their own right. So that the letters of administration constituted no part of their title.

A certificate of discharge of McPherson, as a bankrupt, was offered in evidence, with a seal, said by counsel to be the seal of the United States District Court in Richmond, but not stated by the clerk to be such, but barely signed by him.

The COURT (CRANCH, J., absent,) permitted verbal evidence to be given that this was the seal, and also that the clerk of that court, W. Marshall, had usually attested records in that manner, and did not insist on its being authenticated agreeably to the requisites of the Act of Congress, as it was not the Act of a State court, but one of the United States. (Judge Fitzhugh's Notes.)

WISE, Assignee of McCrea, v. DECKER.

In Virginia an action for use and occupation will lie although there be a parol demise for a time and rent certain, if it be waived, and a promise to pay for the time occupied.

The writ is not abated by substituting the assignee as plaintiff in place of the bankrupt.

ASSUMPSIT, for use and occupation. Plea in abatement, for variance between the writ and the amended declaration. General

demurrer and joinder. The writ was sued out before the bankruptcy of McCrea. After the assignee was appointed he was admitted plaintiff, under the 13th section of the bankrupt law. The general demurrer to the plea was adjudged good, and *respondeas ouster* awarded. Plea, *non assumpsit*, and issue.

Mr. Taylor, for the defendant, prayed the Court to instruct the jury that if, from the evidence, they should be of opinion that the agreement was for a year certain, at a certain price, the plaintiff was not entitled to recover on either of the counts.

The COURT instructed the jury that, if they should be of opinion, from the evidence, that there was such an agreement, but that it was afterwards waived, and that the defendant promised to pay for the time he occupied, then the evidence would support the counts.

LEAY & GLADSTONE, Assignees of Adam Stewart, a Bankrupt in Great Britain, v. JAMES WILSON.

A copy of the proceedings of the commissioners of bankruptcy, in England, certified by a notary and the American consul, or by a notary and the mayor of Liverpool, is not evidence admissible under the Act of Assembly of Virginia, because not recorded in England, so as to make them evidence there.

ASSUMPSIT. A copy of the proceedings of the commissioners of bankruptcy, was offered in evidence by the plaintiffs' counsel, *Mr. C. Lee*, certified by a notary-public at Liverpool, with a certificate of the American consul, that he was a notary-public. He also offered another copy, certified by a notary-public and the mayor of Liverpool.

Mr. Taylor, for the defendant, objected that neither copy was admissible under the Virginia Act, Old Rev. Code, 168, because it had no seal of State, and because the deed of assignment was not acknowledged or proved by witnesses, according to the Act, nor registered according to the laws of England.

Mr. Lee, contra. The act prescribing one mode of authentication does not preclude the Court from receiving papers authenticated in a different manner.

Mr. Taylor, in reply. The deed of assignment is not proved or acknowledged according to the Act of Assembly. The proceedings ought to be certified by the Register of the Court of Chancery, or the Lord Chancellor, under the great seal of England. By the Stat. 5 Geo. 2, c. 30, § 41, the proceedings may be entered of record, and copies of such record are made evidence.

The COURT refused to permit either of the copies of proceed-

Woodrow v. Coleman.

ings to be given in evidence, because not recorded in England, so as to make them evidence there, to bring it within the Act of Assembly ; and because it was not a sworn copy.

HARPER v. WEST'S EXECUTRIX.

If the agent of the drawee of a bill write an order on the back of it to another person to pay it, this order is evidence of the drawee's acceptance of the original bill. Evidence may be given to show that the defendant is executrix in her own wrong, without charging her as such.

ASSUMPSIT, upon a bill drawn by Luke, on West, in favor of plaintiff, and accepted by West, by C. Stephenson, his agent.

The evidence was an order drawn by Luke, on West, and on the back of it, an order drawn by Stephenson, in behalf of West, on the treasurer of the theatre.

Mr. Jones, for the defendant, objected, that this was not evidence of an acceptance by West.

But the COURT overruled the objection, being of opinion that if Stephenson was the authorized agent of West, for that purpose, his indorsement, in the form in which it was written, amounted to an acceptance. *Moor v. Withy*, Esp. N. P. 42.

Mr. Jones objected to the plaintiff's giving in evidence acts to prove the defendant to be executrix in her own wrong, contending that if he meant to rely upon such evidence, he ought to have stated it specially in his application.

But the COURT (*nem. con.*) permitted the plaintiff to go into evidence of acts of interfering with the goods of the deceased, &c.

WOODROW v. COLEMAN.

After judgment for the plaintiff on the defendant's demurrer, and writ of inquiry awarded, the Court will not permit the defendant to plead *de novo*, unless he will withdraw his demurrer.

THE COURT, at last term, overruled the defendant's demurrer, but the judgment was not entered until this term ; and the jury being now called to be sworn to inquire of damages, —

Mr. Taylor, for the defendant, offered to plead a breach of covenant on the part of the plaintiff in bar of the action, and contended that the covenants were dependent.

The COURT refused to suffer the defendant to file the plea offered.

Mr. Taylor then offered the general issue to the breach assigned.

The COURT intimated that they would not permit the plea, unless the judgment on the demurrer should be struck out, and the demurrer withdrawn.

Mr. Taylor refused to withdraw the demurrer, and the writ of inquiry was executed.

MAYOR AND COMMONALTY v. THOMAS MOORE and his Sureties,
Charles Simms and Thomas Swann.

It is not necessary, to the delivery of a deed as an *escrow*, that the obligee should be privy to its delivery, nor that the thing to be performed, as a condition of the delivery, should be a thing to be done by the obligee.

DEBT, on an auctioneer's bond. Plea, 1st, *non est factum*, and 2d, delivered as an *escrow*, to be his deed, if also executed by William Hodgson and Peter Sherran, who did not execute it. Issue to the 1st plea; special demurrer and joinder to the 2d plea, because, 1st, the plaintiffs were not privy to the delivery as an *escrow*; 2d, the thing to be performed is to be done by strangers and not by the plaintiffs.

Mr. E. J. Lee, for the plaintiffs. The obligee must be privy and consent to the conditional delivery. It does not appear that Cleon Moore, to whom it was delivered as an *escrow*, was authorized by the plaintiffs to receive it as such. It must be on condition that the plaintiffs do something. Shep. Touch. 13, 57; Viner, Ab. 27. But here the condition was to be performed by strangers.

Mr. Simms. If Cleon Moore had no authority to receive the deed, then it is neither a deed nor an *escrow*.

The COURT overruled the demurrer. KILTY, C. J., *contrà*.

Thereupon *Mr. J. Lee* moved the Court to strike out the judgment, and for leave to withdraw the demurrer, and to file general replications to the pleas, which was granted upon payment of the cost. FITZHUGH, J., doubting whether the demurrer could now be withdrawn.

Upon the trial of the issues, *Mr. E. J. Lee* asked Cleon Moore, the subscribing witness, whether his name was signed by himself, to which he answered in the affirmative, but was not asked as to the delivery of the deed. The attestation was thus: "sealed and delivered in presence of Cleon Moore."

Mr. Simms prayed the Court to instruct the jury that there was no evidence of the delivery of the deed.

The COURT gave the instruction. It being no more than prov-

Baker & Comegyss v. Vasse.

ing the handwriting of the subscribing witness, while he was living, and within reach of the process of the Court.

Verdict for defendants.

BAKER & COMEGYSS v. AMBROSE VASSE.

A note given before the bankruptcy of the maker, payable after and taken up by the payee (the indorser) before final certificate, may be proved under the commission.

ASSUMPSIT, upon a promissory note. The first count stated the note to have been given to the plaintiffs without valuable consideration, but to be indorsed by the plaintiffs to enable the defendant to raise money for his accommodation; that the plaintiffs indorsed it in blank; and that the note so indorsed was, in a regular course of mercantile negotiation, transferred, for a full and valuable consideration received by the defendant, to one Matthew Lawler; that when it became due the payment was demanded (but not stating by whom) and not being paid was protested, and notice was given to the plaintiffs whereby they became liable to pay; that the plaintiffs paid it on the 17th May, 1802, of which the defendant had notice, whereby he became liable to pay to the plaintiffs, and in consideration thereof promised to pay. The declaration also contained the usual money counts. The defendant pleaded, 1st, *non assumpsit*; 2d, a discharge under the bankrupt law; 3d, that the note was not drawn payable to plaintiffs, to be indorsed by them for the accommodation of defendant, to enable him to raise money for his own use.

The case was argued by *Mr. C. Lee*, for the plaintiffs, and *Mr. Simms* and *Mr. E. J. Lee*, for the defendant, and the question made was whether the note upon which this action was brought, could have been proved under the commission of bankruptcy against the defendant.

KILTY, C. J., and FITZHUGH, J., were of opinion that it could not.

CRANCH, J., that it could; but the COURT intimated that they would reconsider the case; and a verdict was taken for the plaintiffs subject to the opinion of the Court on a case to be stated.

The case stated that on the 10th November, 1801, at Philadelphia, the defendant signed and delivered to the plaintiffs his note for \$2500, payable one hundred and twenty days after date; that the plaintiffs on the day of the date of the said note, indorsed the same for the accommodation of the defendant, and to enable the defendant to raise money upon it for his own use, and redelivered

said note to the defendant ; that at the time of indorsing and re-delivering the said note, the plaintiffs received from the defendant his indorsement upon their note for a like amount, payable at the same time, for the accommodation of the plaintiffs, to enable them to raise money for their own use, which was the only consideration for the indorsement of the first-mentioned note ; that plaintiffs paid the whole of each of said notes to the last indorsees before the commencement of this suit, to wit, on the 17th May, 1802, with the interest and charges of protest, on the first note which was paid to M. Lawler, an indorsee thereof, and they have never received payment of any part thereof from the defendant. That sometime in the year 1801, the defendant sold the first-mentioned note, (the cause of action in this suit,) and received the whole proceeds for his own use ; that the amount of the note upon which this suit is brought was demanded of the plaintiffs on the day it became due, to wit, on the 13th of March, 1802 ; that on the 10th of February, 1802, the defendant committed an act of bankruptcy at Philadelphia, and a commission was duly issued against him upon that act, on the 13th of February ; that on the 4th of May the commissioners granted their discharge to the defendant, and on the 28th of May he obtained a final certificate of discharge from the judge of the District Court ; that the debt due on the first-mentioned note was not proved under the commission of bankruptcy, the commissioners having refused to permit the same to be proved.

For the plaintiffs, it was contended, that they could not prove this note under the defendant's commission ; that no debt was due to plaintiffs till they paid the note, and the payment was not made till the 17th of May ; that a debt contracted after the act of bankruptcy will not support a commission, nor can it be proved under the commission. *Bamford v. Burrell*, 2 B. & P. 1. But that if the rule were otherwise its being an accommodation note would prevent its being proved. *Howis v. Wiggins*, 4 T. R. 714 ; *Brooks v. Rogers*, 1 H. Bl. 640 ; *Cowley v. Dunlop*, 7 T. R. 565.

For the defendant. Mutual notes were given, and therefore this was not an accommodation note, but for valuable consideration. If such a consideration passed, the debt was contracted when the note was given. Notes payable at a future day, may be proved under a commission. Bankrupt Act, § 39, [2 Stat. at Large, 32,] ; Coop. Bank. L. 122, 123 ; *Macarthey v. Barrow*, 2 Stra. 949 ; *Ex parte Wardwell*, 3 Wils. 17. A surety in a bond may prove under the commission, and if he pay the debt after the bankruptcy of the principal he cannot recover against him. *Toussant v. Martinnant*, 2 T. R. 100 ; *Martin v. Court*, 2 T. R. 640. Where a party is bound to pay at all events, as these plaintiffs were, he may prove

under the commission, though the debt is payable in future. *Hancock v. Entwisle*, 3 T. R. 435. If the plaintiffs had the note before a final dividend, they might have proved. *Cowley v. Dunlop*, 7 T. R. 565. They are not prevented from proving, because it is an accommodation note. *Staines v. Planck*, 8 T. R. 389. From *Cowley v. Dunlop*, it seems that *Howis v. Wiggins*, and *Brook v. Rogers*, are of doubtful authority; but those cases differ from this, that there, there were not, as here, mutual accommodations. Mutual notes are good considerations for each other; they are not contingent, but actual debts *solvenda in futuro*. *Rolfe v. Caslon*, 2 H. Bl. 570; *Vide*, also, 2 Dal. 127, where the plaintiff may prove under commission if he could maintain debt. *Ex parte Thomas*, 1 Atk. 73, where an indorsee proved a note indorsed after bankruptcy. *Walton's case*, 1 Atk. 122, where an indorser was allowed to prove against the drawer's estate, a bill taken up after bankruptcy; and *Span's case*, Green's Bank. Law, 39, where a holder proved a bill against acceptor's estate, which was negotiated after the acceptor's bankruptcy, and although he had not the bill at the time of his bankruptcy. *Coop. B. L. 214, 215; Cooke, B. L. 211.*

CRANCH, J. The question is, whether the plaintiffs could have proved this note under the commission against the defendant. There is no doubt that the note might have been proved under that commission by somebody. The defendant's estate was already liable for its amount. But it never has been proved under the commission by anybody. The note therefore still exists as a note unsatisfied, and clothed with all its original obligation. The contract which it raised is still in full force as a special and express contract, and the principle of law is well settled, that where the parties have made an express contract, the law will not interfere and raise an implied one. For the law implies a contract only where the parties have failed to make an express agreement, and where otherwise injustice would be done to one of them. The present action being grounded on an implied assumpsit only, it might, perhaps, be sufficient for the defendant to show that there, was an express contract respecting the same transaction. The plaintiffs cannot recover upon both the express and implied contract, for if there is an express contract, there cannot be an implied one. But waiving this bar to the plaintiffs' recovery, I am of opinion that the plaintiffs could have proved the debt under the commission against the defendant, and consequently that his certificate is a bar to the action. Cases have been cited on both sides, which are certainly in some degree contradictory to each other. I shall therefore pass over all the cases which precede that of *Cowley v. Dunlop*, in which they were all taken up and reconsidered; and

which, although it did not decide the question in that case, yet, if I do not misconceive the arguments of the judges, will go very far to decide the present. In the present case the note was originally given and made payable to the plaintiffs on a sufficient consideration; it therefore was a note upon which an action might have been maintained, and immediately created a debt payable in future. Nothing was defective in the original transaction; it was not a contingent debt, but an absolute engagement to pay a sum certain at a certain time, for a valuable consideration. The two notes were mutual considerations for each other, and in an action brought upon either of them against the maker, he cannot support an allegation that it was *nudum pactum*. It is true that if he had been obliged already to pay the other note in consequence of his indorsement, he might plead it by way of set-off, or maintain a counter action against the plaintiff; but until the two notes are thus mutually opposed to each other, both are valid, and remain good evidence of mutual debts. This note then constituted a good claim against the defendant's estate at the time of his bankruptcy. The estate was not only liable for it, but was the principal debtor, to whom the holder might and in justice ought to resort for payment. It ought not to be in the power of the holder to decide whether the certificate should or should not be a bar to the claim. The legislature has attempted to avoid this evil, by declaring that the certificate should be a bar, not only to such claims as were proved, but such as might have been proved under the commission, not contemplating the possibility that the mere transfer of the debt could prevent the certificate from being a bar. In the case of *Cowley v. Dunlop*, 7 T. R. 565, the judges were equally divided upon the question then before the Court. Lawrence and Grose, justices, were decidedly of opinion that the defendant's certificate was a bar to the action; and *Ld. Kenyon*, C. J., in his argument admits principles which if correct are decisive in favor of the present defendant. He admits that if the bill had not been once proved against the defendant (the acceptor) and a dividend received, which, in contemplation of law, he considers as a satisfaction of the bill, and if it had been returned upon the indorser, subsequent to the bankruptcy, the indorser would thereby be remitted to his former right, and be in the same condition as if he had never passed it away, (so as to stand in the place of the indorsee) and consequently might have proved the debt under the commission. But he contends, that inasmuch as the holder of that bill had proved it under the defendant's commission, and received a dividend, whereby the express contract created by the bill was executed on the part of the defendant, and had become extinct, there was no right remaining under that bill to which the

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plaintiff could be remitted, and therefore when the plaintiff paid the balance of the money due upon the bill to the indorsee, a new implied contract arose on the part of the defendant which could not have been proved under the commission, and which therefore was not barred by the certificate. In the present case the note has never been proved under the commission, and therefore it still remains a valid, express contract, attended by all its resulting rights; and consequently, according to his Lordship's opinion, upon being returned upon the indorser, he was remitted to his former right, and might have proved the debt against the defendant's estate. If the arguments of the plaintiffs' counsel are correct, an executor, an administrator, or an indorsee, obtaining possession of the securities after the act of bankruptcy committed, could not prove the debts. By which means a class of creditors, who had *bona fide* given credit to the securities, would, contrary to the express words of the Act of Congress, be precluded from any share in the bankrupt's estate; and the bankrupt himself would be placed in a much worse situation after his certificate than he was in before. For the moment he had given up every thing in the world, he would find himself still encumbered with a load of debts, and exposed to the vengeance or the malice of unrelenting creditors, without a hope of escaping from the burden. Because, under a second commission, he would be entitled only to a discharge of his person unless his estate shall pay seventy-five per cent. on the amount of the debts; and, by the statement of the case, he cannot have any estate at all. A construction of the law which will produce these consequences ought to be very obvious, and at least produced by a necessary implication. I can see no such necessity, and therefore I am obliged to reject such a construction.

The judgment of the COURT was accordingly for the defendant.

The cases of *Buckler v. Buttivant*, 3 East, 72, and *Houle v. Baxter*, 3 East, 177, were not cited, nor seen by the Court, until after their opinion was given. They fully justify it.

WILSON v. JOHNSTON'S BAILIFF.

Actions of replevin, in Alexandria, may, on motion, be tried at the first term.

REPLEVIN, of goods distrained for rent.

Motion by *Mr. Taylor*, to set the cause forward on the docket, under the Act of Assembly, so as to be tried this term. New Rev. Code, p. 155, § 18.

Mr. E. J. Lee, for plaintiff in replevin.

Granted.

Negro Basil v. Kennedy.

HARTSHORNE & TAYLOR v. AMOS ALLISON, JACOB GEIGER, *et al.*
Garnishees.

The garnishee may answer after bill taken for confessed at the rules.

CHANCERY ATTACHMENT. Bill taken for confessed in the office.
Geiger, one of the garnishees, moved for leave to file answer.
Granted.

WOODROW v. COLEMAN.

Full costs will be given in covenant.

MOTION, by the defendant's counsel, that the clerk be ordered to tax only so much costs as damages. New Rev. Code, 109, § 17.

The action was covenant, and verdict for plaintiff, one cent.

Mr. Swann, for the plaintiff, contended that the section applies to actions of trespass. *Gilb. Eq. Cases*; *Bac. Ab.*, Costs.

The COURT gave judgment with full costs.

NEGRO BAZIL v. KENNEDY.

Upon a devise that a slave should be sold for eight years, after which he should be free, the term of eight years shall begin to run from the time of the death of the testator or within a reasonable time thereafter.

THIS was an action to try the right of the plaintiff to his freedom under the will of Mrs. Turner, which was in these words: "I will that my slaves be sold by my executors, for the following terms: Basil for eight years," (and others for other terms,) "and the money arising from the same I desire shall be applied in the following manner, to wit," (&c., giving sundry specific legacies, and the residue to her husband, Charles Turner, she having, by her marriage settlement, reserved the power to devise her estate.) "I will that after the above slaves respectively arrive at the completion of the above terms, they shall be free and their posterity after them at the age of thirty years."

Mr. C. Lee, for the plaintiff, cited *Dade v. Alexander*, 1 Wash. 30; *Mayo's Lessee v. Carrington*, 1 Wash. 45; New Rev. Code, 191, § 36. The testatrix died in 1796. Her husband suppressed the will. Basil was sold as the property of the husband, by the marshal, to the defendant Kennedy, on the 27th of January, 1802.

 Watson v. Summers.

The will was found and proved June, 1804. This action was brought on the 22d of August, 1804. The defendant purchased without notice. This was a vested legacy. *Roden v. Smith*, Amb. 588; 2 P. Wms. 478.

Mr. Swann, for the defendant, contended that the term of eight years could not begin to run until the sale; and that the time of sale was left to the discretion of the executor.

But the COURT decided that it was the intention of the testatrix that the plaintiff should be free after eight years' service after her death; and that the term began to run from the time of her death, unless some cause should be shown for extending it for a further reasonable time; and that as more than eight years had elapsed between the death of the testatrix and the commencement of this action, the plaintiff is entitled to his freedom.

WATSON v. SUMMERS.

A discharge of the appearance-bail, arrested upon a joint *ca. sa.* against him and his principal, does not release the principal.

INJUNCTION. Motion to dissolve. The equity relied upon was, that upon a joint judgment at law against Watson, and Jesse Simms his appearance-bail, Simms had been taken upon a joint *ca. sa.* against him and Watson, and discharged by the plaintiff at law, Summers.

Injunction dissolved. See 10 Vin. Ab. 578, (new edit.) tit. Execution (C. a.), which cites *Higgins's case*, Cro. Jac. 320. If a man has one execution against the bail he shall never have execution after against the principal, for he has made his election by the first execution. So if the principal be in execution he cannot take the bail. See *Walker v. Alder*, Styles, 117, and *Price v. Goodrick*, Styles, 387. But, says Viner, if the bail be taken in execution in B. R. and pays part, yet, if the bail be let at large, execution may be against the principal afterwards; and this is the constant practice of the court; and it seems that *Higgins's case*, Cro. Jac. 320, is to be intended where the bail were in custody. *Felgate v. Mole*, 1 Sid. 107; *Clarke v. Clement*, 6 T. R. 525. One of two joint defendants discharged on *ca. sa.* by plaintiff, the other cannot be taken. *Hayling v. Mulhall*, 2 W. Bl. 1235; *Freeman v. Freeman*, Cro. Jac. 549. Execution issued against the bail, yet the plaintiff may charge the principal, unless it be shown that he was satisfied by the execution against the bail. *Whitacres v. Hamkinson*, Cro. Car. 75. Two are jointly and severally bound, and judgment had against one. In debt against the

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other, he pleaded that the first being in execution on a *ca. sa.* the sheriff voluntarily let him go at large; but adjudged that the creditor may take out execution against the other: for execution without satisfaction is no bar, though the sheriff suffered him to escape voluntarily, so as plaintiff is entitled to an action against the sheriff. But if he let him go by license of the creditor, then the other had been discharged, and it might have been pleaded.

PRIME v. McREA'S EXECUTORS AND HEIRS.

One half of the real estate of a testator in Virginia is liable for his debts, although not charged by the will. *Quære.*

CRANCH, J., doubted, whether a decree can be made to sell the real estate of McRea in the hands of his heirs unless there be a mortgage or other lien; or unless the personal estate has been applied to relieve the real.

Mr. E. J. Lee, for the complainant, cited *Robinson v. Tonge*, 3 P. Wms. 398, and *Finch v. Earl of Winchelsea*, in a note to that case, and *Stileman v. Ashdown*, 2 Atk. 608. (*Cur. ad. vult.*)

The COURT afterwards decreed a sale of half of the lands and rents.

DICKEY & TOM, Assignees of HARMON & DAVIS Bankrupts, v. HARMON & DAVIS & others.

A draft drawn by a bankrupt, not payable out of any particular fund, is not such an assignment of the money in the hands of the drawee as will give the holder a right to the money before the acceptance of the draft. It is, at most, only a security, and does not entitle the holder to be relieved for more than his ratable part of his debt.

BILL in equity in the nature of an attachment by the assignees of bankrupts in New York, against the absent bankrupts, and R. B. Jameson, the garnishee, and certain attaching creditors, and one Sackett, who claimed, by virtue of a draft from Harmon & Davis, the bankrupts on R. B. Jameson, the garnishee, dated, as it was alleged, before the act of bankruptcy committed. The bill alleged that the act of bankruptcy was committed by Harmon & Davis, on the 17th of August, 1802. The draft given by the bankrupts to Sackett upon Jameson, was dated on the 18th of August, 1802, and presented to Jameson for acceptance, on the 23d of August, 1802. Jameson admitted himself to be indebted to the bankrupts in the sum of \$867.48, but refused to accept the draft because the money had, on the same day, been attached in his

Dicky & Tom v. Harmon & Davis.

hands by Scott & Co., creditors of the bankrupts. There were several other subsequent attachments, but the only question was, whether the complainants, the assignees of the bankrupts, or Sackett should have the money in the hands of Jameson. The commission of bankruptcy issued on the 18th of September, 1802, and the act of bankruptcy was admitted to have been committed subsequent to the attachments, and consequently subsequent to the presentation of the draft to Jameson.

Mr. Swann, for Sackett, contended that the draft was an assignment of the fund in the hands of Jameson, fairly made for valuable consideration before bankruptcy, and gave him an equitable right to receive and recover the money, and that it was not revoked by the subsequent bankruptcy. *Masters v. Miller*, 4 T. R. 343; *Row v. Dawson*, 1 Ves. 331.

Mr. Simms, *contra*, for the assignees of the bankrupts, contended that the draft was not an assignment of the fund, and could at most amount to no more than a security, which, by the 31st section of the bankrupt law, gave the creditor no priority or preference.

The COURT took time to consider; and at June term, 1805, were of opinion that the complainants, Dickey & Tom, assignees of the bankrupts, were entitled to the money in the hands of Jameson.

CRANCH, J., concurred, because he considered the draft in favor of Sackett, as a security only, and not an assignment of the fund, and that by the 31st section of the bankrupt law he could not be relieved for more than a ratable part of his debt.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1804, AT WASHINGTON, BEGUN DECEMBER 24.

FRAZIER *v.* BRACKENRIDGE, Executor of White.

An executor may be ruled to plead before the expiration of the year after letters granted.

MOTION for rule to plead.

Mr. Key objects, that an executor is not obliged to pay money until twelve months after letters testamentary granted, and therefore is not obliged to plead. *Cur. ad. vult.*

Rule granted to plead by the 2d day of next term.

UNITED STATES *v.* W. PROUT.

The selling of spirituous liquors to negroes, in a public manner, assembled in considerable numbers, and suffering them to drink the same in and about the house on the Sabbath, constitutes it a disorderly house.

THE COURT, in answer to a question from the jury, instructed them that the selling of spirituous liquors to negroes in a public manner, assembled in considerable numbers, and suffering them to drink the same in and about the house on the Sabbath, constitutes it a disorderly house. Verdict for United States.

N. B. The defendant had not an ordinary license. Fined \$100.

UNITED STATES *v.* COULTER.

The practice of selling spirituous liquors, in a public manner, to negroes and slaves, assembled in considerable numbers, and suffering them to drink the same in and about the house on the Sabbath, constitutes the offence of keeping a disorderly house, although the owner may have a tavern license.

INDICTMENT for keeping a disorderly house.

Mr. Morsell, for the defendant, contended that a disorderly

Perry v. Barry.

house is only indictable at common law as a common nuisance, and that actual disorder must be proved. Coulter had a license to keep tavern; he is only prohibited by statute from selling on Sundays; from dealing with slaves, &c.

Mr. Jones, Attorney for the United States. A bawdy-house is indictable as a common nuisance, and yet it is not necessary to prove that any one person has been disturbed by it. The tendency to corrupt the morals makes it a common nuisance.

The COURT. The license does not authorize the defendant to sell to slaves or negroes on a Sunday; it is therefore no justification as to those facts. The practice of selling spirituous liquors in a public manner to negroes and slaves, assembled in considerable numbers, and suffering them to drink the same in and about the house on the Sabbath, constitutes the offence of keeping a disorderly house.

Verdict, guilty. Fined \$10.

PERRY *et al.* Assignees of Nantes, surviving Partner of R. Muilman & Co., an English Bankrupt, v. JAMES BARRY.

The assignees of a British bankrupt cannot maintain a suit in their own names, in Maryland, against a debtor of the bankrupt, and it seems that a promise to pay the money to them would be void for want of a consideration.

INDEBITATUS ASSUMPSIT for money had and received by defendant to the use of the bankrupt, and of the plaintiffs as his assignees. Hadfield, of London, held a protested bill for \$19,000, drawn by Browne, of Richmond, Virginia, and assigned it to Muilman & Co., of London, for collection, who employed Barry (the defendant) as their agent to collect it. Muilman & Co. became bankrupt. Barry collected the money and remitted it to Hadfield, who afterwards also became bankrupt. The assignees of Muilman & Co. contended that the money belonged to that house, and brought this action to recover it.

Mr. C. Lee, for the plaintiff, contended, 1st., That all the right of Muilman & Co. was transferred to their assignees; 2d. That they were competent to receive a promise from the defendant to pay, and to maintain this action upon such a promise; 3d. That the letter of the 18th of July, 1798, and the other letters amount to a special assumpsit and account current with Muilman & Co., and a promise to pay to the plaintiffs; and prayed the Court to instruct the jury, 1. That plaintiffs had a good title to the money, and, 2. That it was not defeated by the payment to Hadfield. Upon the first point he cited the following cases:

Philips v. Hunter, 2 H. Bl. 409; *Young v. Willing*, 2 Dal. 276; *Harris v. Mandeville*, 2 Dal. 256; *Emory v. Greenough*, 3 Dal. 369; *Bruce v. Bruce*, 2 B. & P. 229 (n.); *Pipon v. Pipon*, Amb. 25; *Cook*, B. L. 497; *Hunter v. Potts*, 4 T. R. 182.

Mr. Mason, for the defendant, contended, 1st. That the assignees, under the British bankrupt laws, have no power to maintain an action, as such, in this Court; 2d. That nothing which has passed between James Barry and the assignees has given them that right. 1. The laws of one country have no effect in another. *Cheston v. Page*, in the Court of Appeals in Maryland; *Sill v. Worswick*, 1 H. Bl. 665; *Hunter v. Potts*, 4 T. R. 182; *Philips v. Hunter*, in the Exchequer, 2 H. Bl. 665. The point decided in these cases is, that in case of a British bankruptcy, if a British subject sends to a foreign country and gets effects of the bankrupt, and brings them to England, the assignees have a right to recover them. But that is not the present case. This debt was not contracted in England, but in America. *Mr. Barry*, the defendant, is not a British subject. The bankrupt laws of England were never considered as of force in Maryland, and many tracts of land in that State are now held under attachments against bankrupts. A large tract, called *Bradford's Rest*, is now thus held by Colonel George Plater. *Mr. Brown* of Annapolis, a fugitive bankrupt, now maintains actions in his own name. If this should be considered as a voluntary assignment, yet it will not authorize the assignees to sue in their own name. A chose in action is not assignable. By the local law of this country, this debt cannot be assigned. Assignees may sue in the name of the bankrupt. The Acts of Assembly of Maryland, 1704, c. 29, and 1753, c. 36, give the commissioners of bankruptcy a right to sue, provided they shall give bond, &c.; this shows that the statutes of bankruptcy did not extend to this country. 2. Nothing has passed between the plaintiffs and the defendant which will authorize them to maintain this action. 1. There is no promise contained in the letter; 2. If there is such a promise, it is void for want of consideration. The assignment was of no force (according to the Acts of 1704 and 1753) until the assignees should give bond, &c., which they never did. The remedy must be pursued according to the laws of this country.

The Court was of opinion, 1. That the assignment did not give the assignees a right to maintain an action in their own names in right of the bankrupt, and that whatever may be the general principle, it must yield to the laws of Maryland (1704 and 1753) enacted upon that subject; 2. That there was no evidence of an express *assumpsit* by the defendant to the plaintiffs, and if there was, yet as the assignment is to be considered as

 Lindsay v. Twining.

totally void, there was no consideration; 3. That if the action had been in the name of the bankrupt, the assignment, being void, could not have been set up as a bar.

The plaintiff's became nonsuit.

BAYSAND v. LOVERING & WIFE, as Executrix *de son tort* of Andrew White.

An executor, *de son tort*, is liable for the value of the goods taken and used.

ASSUMPSIT on bill of exchange; pleas never executrix, *non assumpsit*, and limitations.

The COURT instructed the jury that if they should be of opinion that the defendant took the goods of the deceased and used them as her own, and not for safe keeping, she is chargeable as executrix in her own wrong to the amount of the goods so used.

Mr. Mason for the defendant.

Mr. Morsell for the plaintiff.

RHODES v. BROOKE.

The defendant may give special bail at any time during the return term, although the plaintiff may have taken an assignment of the bail-bond.

Mr. Woodward, for the defendant, moved to enter special bail. *Mr. Hewitt*, for the plaintiff, objects that he had taken an assignment of the bail-bond, and contended that the defendant has no right to give special bail after the four first days of the term.

Cur. ad. vult. Motion granted, and special bail given; the COURT being of opinion that the defendant should have the whole term to give special bail.

LINDSAY v. TWINING.

The Court will not, at a subsequent term, reinstate a cause which has been *non prossed* for want of security for costs.

NON PROS. at last term for want of security for costs.

Mr. Woodward moved to reinstate the cause, upon the affidavit of Colonel D. C. Brent, that he had directed the clerk to enter him security, but the clerk had failed so to do. The clerk stated

Levering v. Bank of Columbia.

that Colonel Brent had, in his office, told him he would get security.

Motion refused ; the term being passed, and the clerk having no right to judge of the sufficiency of the security offered. It should have been offered to the Court. The clerk was in no default.

UNITED STATES v. M'CANN & DULANŸ.

The owner of the goods stolen may release to the United States his interest in the fine which may be imposed, and be examined as a competent witness in chief in behalf of the prosecution, under the Act of Congress.

INDICTMENT for stealing a steer, the property of Thomas Young and Thomas Files, under the Act of Congress. Young and Files having executed a release to the United States of all interest in the fine, &c., were admitted by the Court as witnesses generally on behalf of the United States.

Mr. Key, for the prisoners, argued that the United States were not competent to receive a release ; that the interests of the United States and the owner were several, not joint ; that as a body corporate they could not take a gift of personal property, unless there were some officer authorized by law to accept ; that there was nothing *in esse* which could be the subject of the release.

But the COURT, *contra*. This question has already been decided by this Court, and they see no reason to alter the former decision. They are confirmed in their former opinion by *Esp. Law* of Ev. 106, 163, and the case of *Goodtitle v. Welford*, Doug. 139. See *U. S. v. Clancey*, [*ante*, 13] ; *U. S. v. Hare*, [*ante*, 82].

LEVERING v. BANK OF COLUMBIA.¹

The wages of a seaman on board of a ship in port who was hired to take care of her, at a dollar a day while in port, are not a lien on the ship ; nor are repairs and provisions furnished to a ship in Baltimore in Maryland, the owners residing in Alexandria, District of Columbia.

ASSUMPSIT, for money paid and advanced for the use of the defendants.

¹ See *Levering v. Bank of Columbia*, *ante*, 152.

The jury not having agreed at the former trial, in December term, 1803, the cause now came on again, and the facts appeared to be as follows: The defendants had sold to the plaintiff half of the ship Alexandria, to be delivered to the plaintiff free of all liens and incumbrances. One Donaldson was hired by the former owners, at Alexandria, (D. C.) to go to Baltimore, and to take charge of the ship, until the owners should get a freight for her, and prepare her for a voyage. In case a freight should be procured he was to go the voyage as mate, at thirty-six dollars a month. The owners then resided in Alexandria.

Mr. Morsell, for the plaintiff, contended that the following claims are liens on the ship: 1. Mate's wages while the vessel lay in the port of Baltimore. 2. Repairs, particularly a figure-head, &c., made in Baltimore. 3. Provisions and necessities furnished the ship while in Baltimore, by persons residing in Baltimore, and cited the following authorities: *Wells v. Osman*, 2 Lord Raymond, 1044; *Rich v. Coe*, Cowp. 636; 2 Bacon, (Gwill. ed.) Court of Admiralty, 108, 181; 4 Inst. 141; 1 Vent. 146, 343; 3 Mod. 244, 245; *Clay v. Sudgrave*, and *Bailey v. Grant*, Salk. 33, pl. 4, 5; Ld. Raymond, 576, 632, S. C.; Carth. 518, S. C.; *Wheeler v. Thompson*, Str. 707; *Ragg v. King*, Str. 858; *Read v. Chapman*, Str. 937; *Alleson v. Marsh*, 2; Vent. 181; Roll. Ab. 533; Cro. Car. 296; Resolution of the Judges respecting the Admiralty Jurisdiction; *Ross v. Walker*, 2 Wils. 264; 1 Com. Dig. 390; *Hook v. Moreton*, Ld. Raym. 397; *Opy v. Child*, 1 Salk. 31; *Westerdell v. Dale*, 7 T. R. 306; *Farmer v. Davies*, 1 T. R. 108; 4 Burrow, 2220; *Green v. Farmer*, 4 Burr. 2220; *Farrel v. McClea*, 1 Dall. 392.

Mr. Mason and *Mr. P. B. Key*, *contra*, contended that there was no lien for any of the claims. The wages claimed by Donaldson were not due upon a contract to be performed at sea; it was a contract made on land, to be performed on land; it was not in the usual form of a maritime contract. No voyage was ever agreed upon or made. There is no lien for repairs made in the country of the owner. As to the admiralty jurisdiction, all the ports of the United States are parts of one country. Alexandria and Baltimore are not foreign to each other. There was no lien for provisions furnished to the ship in Baltimore. They cited the following authorities: 1 Bac. Ab. old ed. 622, tit. Admiralty; *Ross v. Walker*, 2 Wils. 264; 6 Mod. 238; *Wells v. Osmond*, 6 Mod. 238; *Watkinson v. Bernardiston*, 2 P. Wms. 367, and note to that case; Abbott, 290, 378; *Buxton v. Snee*, 1 Ves. 154; Abbott, 91, 379, and the cases there cited; *Hoare v. Clement*, 2 Shower, 338; *Ex parte Shank et al.* 1 Atk. 234; *Wilkins v. Car-*

michael, Doug. 101; *Wood et al. v. Hamilton*, Dom. Proc. June 15, 1789.

The COURT instructed the jury as follows: That if the jury should be of opinion, from the evidence, that the contract between the owners and Ronald Donaldson was that he should go from Alexandria to Baltimore, there to take charge of the said ship as mate, and prepare her to receive a cargo as soon as the owners should be able to procure a freight for her, and that he should be paid at the rate of one dollar a day for the time he should be so employed in the port of Baltimore, the ship was never liable for the wages due to him for the time he was so employed. But if the jury should be of opinion, from the evidence, that the work done by Donaldson was done by him as mate, under a contract made by the owners with him to perform a stipulated voyage, then the ship was liable for his wages for the time he was actually employed, although the contemplated voyage was not performed, unless the non-performance was owing to the default of the said Donaldson. The ship was not liable for the repairs, nor for the provisions furnished.

The jury having been out two days the COURT ordered them to be brought in and gave them the following instruction, viz.: The Court, in this case, further instruct the jury, that if they should find the facts to be true, as stated in the paper handed to them and admitted by the counsel on both sides, then the contract made by the owners of the said ship with the said Donaldson consisted of two separate parts, one of which was absolute, whereby he was to go to Baltimore and go on board the said ship and prepare her to receive a cargo as soon as the said owners should be able to procure a freight for her, and that he was thereby to receive for his wages one dollar a day and be found, while he continued on board the ship in port preparing her to receive a cargo. That the other part of the said contract was contingent, and was not to take effect until the said ship should take in a cargo and proceed to sea; and that by this last part of the contract, if it had been carried into effect, the said Donaldson would have been entitled to thirty-six dollars per month for his time after the vessel sailed, but no provision was in this second part of the contract made for his wages while in the port of Baltimore, as aforesaid.

Verdict for the defendants. No writ of error was ever prosecuted. See *Ramsay v. Allegre*, 12 Wheaton, 611, Judge Johnson's opinion, and *Clinton v. Brig Hannah*, Bee, 419; *Shrewsbury v. Sloop Two Friends*, Bee, 435; *Bridgman's case*, Hobart, 11; *Justin v. Ballam*, 2 Ld. Raymond, 805.

UNITED STATES v. SCIPIO BROWN.

The owner of the goods stolen, having released to the United States his interest in the fine, is a competent witness for the United States, upon the prosecution under the Act of Congress.

INDICTMENT, for stealing a pair of boots, the property of Benjamin Birch. Benjamin Birch executed a release to the United States of all his right to the fine, and was thereupon examined as a witness for the United States, generally, upon the authority of the case of the *United States v. McCann & Dulany*, [ante, 207,] and of a former case, *U. S. v. Clancey*, [ante, 13]; *U. S. v. Hare*, [ante, 82.]

Bill of exceptions taken.

Verdict, guilty. Sentence, twenty stripes, and one dollar fine.

F. T. GANTT v. C. C. JONES.

Where there are two joint indorsers notice must be given to both.

If one of the joint indorsers pay the note, he cannot recover a moiety from the other indorser unless he was liable to pay the note.

Quære, as to interest on money had and received.

ONE joint surety having paid the whole, sues the other surety for a moiety. *Assumpsit* for money paid for the defendant's use; and money had and received by the defendant for the plaintiff's use.

Case stated. The material facts of this case are, that the plaintiff and defendant being joint payees of Suter's note, dated 16th of June, 1800, payable twenty-four months after date, indorsed and passed it away. That the note being unpaid, and the plaintiff being arrested upon a joint writ, against him and the defendant, issued upon said note, eight months after it became payable, paid the full amount with interest and costs, being \$452.60, to the holder, and took up the note. That he had before paid the defendant \$250, for the purpose of paying half the said note, which defendant had not applied to that use. That the note was given and indorsed by the plaintiff and defendant, for a debt due from Suter to D. Happart, to whom the plaintiff and defendant indorsed and delivered it. That on 21st June, 1802, a notary-public demanded payment of the note at the last place of abode of Suter, and received for answer that he had sailed for the East Indies, and left no funds to take up the note, whereupon it was protested and returned to the holder. That the defendant, Jones, always did live and still lives within six miles of Georgetown,

where the note was given. That Gantt returned to this country about the 15th of February, and the writ was served on him the 22d of February, 1803, when he paid the money. That the first writ was served on C. C. Jones, the defendant, on the 18th of December, six months after the note was payable. That Jones had not, in any manner, accounted with the plaintiff for the \$250.

Upon this statement of facts the plaintiff prayed the Court to instruct the jury that plaintiff has a right in this suit to recover of the defendant the sum of \$250, with interest thereon, from the 8th October, 1802, and also the further sum of \$226.30, with interest thereon to be computed from the 22d of February, 1803.

Whereupon the COURT instructed the jury that, upon the above statement of facts, the plaintiff is entitled to recover the above-mentioned sum of \$250, with interest thereon, from the 8th day of October, 1802, upon the count for money had and received by the defendant to plaintiff's use. But that he is not entitled, upon either count in the declaration, to recover the other sum of \$226.30, nor any part of it, for the moiety of the amount of the note so paid by the plaintiff, as aforesaid.

Plaintiff took a bill of exceptions, but did not prosecute a writ of error.

The grounds of this opinion, as stated by the Court, were, that it did not appear that the plaintiff and defendant were liable at the time the plaintiff paid the money; and no assent of defendant to the payment made by the plaintiff is stated. That in order to make the plaintiff and defendant liable upon their indorsement upon the note, the holder must have given due notice to them of the non-payment by the maker. That notice to Gantt, eight months after the note was payable, (although it should be proved to be given instantly on his return to this country,) was not due notice, the other joint indorser being a resident six miles only from Georgetown — nor was the service of the writ upon Jones, six months after the note became payable, reasonable notice.

Quære, as to interest upon the \$250 on the count for money had and received. See *Tappenden v. Randall*, 2 Bos. & Pul. 467; where the court held, that in an action for money had and received, nothing but the net sum advanced, (without interest,) could be recovered.

ROBERTSON'S ADMINISTRATOR v. SELBY.

Creditors of the plaintiff's intestate are competent witnesses to support a claim by the plaintiff as administrator against the defendant.

SEVERAL persons, supposed to be creditors of the plaintiff's intes-

MOUNTZ *v.* JONES.

tate, whose estate was insolvent, were offered as witnesses for the plaintiff upon the general issue.

Mr. Mason objected to their competency, on the ground of interest.

But the COURT said that such a remote possibility of interest goes to the credit, and not to the competency, of the witness.

The witnesses, however, released to the plaintiff all their interest, and were sworn.

SADLER *v.* MORE.

A witness cannot have an attachment for his fees until he has proved his attendance, obtained an order of Court that the party should pay him, and produced evidence of the service of the order, and of the party's refusal to obey it.

MATTHEW DULANEY, a witness summoned by the defendant, applied for an attachment against him for not paying his fees for attending.

The COURT were of opinion, that he must first prove his attendance, and get an order of Court and serve it upon the defendant, and produce affidavit to that effect, and of the defendant's refusal to pay.

MOUNTZ *v.* JONES.

Under the Insolvent Act of 1774, c. 28, a discharge of the debtor is not valid unless a copy of the justices' certificate be affixed at the door of the county clerk's office.

PLEA of release under the Insolvent Act of 1774, c. 28. General demurrer.

Mr. Mason, in support of the demurrer, contended that the release was not valid under the Act of 1774. That act provides that a copy of the justices' certificate shall by the sheriff be affixed to the door of the clerk's office of the county, and at the door of the prison of the county. The prisoner must be confined in the county jail, and the debtor's property is to vest in the sheriff of the county. The plea states that the copy was put up on the door of the clerk of the corporation, and on the door of the jail of the corporation, and that the prisoner was confined in the jail of the corporation, in custody of the sheriff of the corporation. No power was vested in the corporation to have a jail. The justices met at the corporation jail.

Mr. Morsell, contra. The Act of 1774, meant to apply to all cases of commitment for debt, where the debts did not amount to £200 sterling. It was not necessary that the commitment

 MORRIS v. GARDNER.

should be in the common jail of the county. The corporation jail, was a jail of Montgomery county. Georgetown was part of the county of Montgomery. The justices acted not as ministerial, but as judicial officers, in discharging prisoners. Their certificate, is, therefore, conclusive evidence of a compliance with the requisites of the Act of 1774. The power to have a jail is an incident to the judicial power over criminals vested in the court of the corporation, by the charter of Georgetown, 1787, c. 23. The alderman's executions were returnable to the mayor's court, who had a right to commit on non-payment. It was a case within the spirit of the Act of 1774.

The COURT, (CRANCH, J., *contrà*,) were of opinion, that the plea was bad, because a copy was not set up at the door of the county jail, but only at the corporation jail.

KILTY, C. J., thought, also, that the county justices had no authority to command the corporation sheriff.

OFFUTT, Executor of Offutt, v. BEATTY.

After oyer prayed and demurrer by the defendant, the plaintiff is not bound to give oyer at a subsequent term. The defendant should have spread the oyer upon the record. The Court will not give leave to amend a demurrer, unless it goes to the merits of the case.

THE defendant prayed oyer of the letters testamentary, and demurred thereon to the writ and declaration, specially, because the letters testamentary were not granted in the District of Columbia.

Mr. Morsell, for the defendant, had not set forth the letters, but merely stated that oyer was granted in the words following, &c., and then demurred, without having, in fact, had oyer, so that the letters testamentary did not appear, for the plaintiff is not obliged to produce the letters after the term at which they are offered.

Demurrer overruled, and no leave given to pray oyer anew, it not being a demurrer on the merits.

B. W. MORRIS *et al.* v. JOHN GARDNER.

Notice to an indorser is necessary, unless he knew the maker to be insolvent at the time of indorsement.

Where the parties live within two miles of each other, nine days' delay is fatal.

A subsequent promise by the defendant to pay, made with a full knowledge of his discharge, will bind him.

ASSUMPSIT against the defendant as indorser of a note of Ander-

son; and for goods sold and delivered; and for money had and received; and upon an *assumpsit* in writing to pay seventy dollars for Anderson.

The evidence was, that the defendant was indebted to the plaintiff for goods sold; and gave and indorsed to the plaintiff Anderson's note for a smaller amount than the debt due for the goods, which note was to be collected by plaintiff, and when received, the money was to be applied to the credit of the defendant. The note became payable 9 and 12 July, 1802. The plaintiff received on the 21st of July, forty dollars in part. No notice was given to the defendant of non-payment, until after the receipt of the forty dollars. The defendant lived in Washington. The plaintiff's agent, who held the note, lived in Georgetown. Afterwards, and after the note was payable, and after the payment of the forty dollars, to wit, at last term, the plaintiff recovered judgment against the defendant for the balance of the account of goods sold, after deducting the amount of the note. Gardner said, at the time of indorsing the note, that he expected it would be difficult to get the money of Anderson, but the plaintiff could get it better than he could.

Upon the first count, (which is on the note,) the COURT gave the following instruction. That it is necessary for the plaintiff to prove that a demand was made on Anderson, the maker, and notice of his refusal given to Gardner, the indorser, in due time, unless it should appear that Anderson was insolvent when the note was indorsed and delivered to the plaintiff, and was known by Gardner to be so: That the defendant, Gardner, was discharged from his liability by the want of such demand and notice, but that his assumption would make him again liable, if made under a knowledge of the facts and of the law as to his being discharged: And further, that if the jury should be of opinion, from the evidence, that the defendant lived in the city of Washington, and the plaintiff's agent in Georgetown, the distance being about two miles, notice to the defendant, given nine days after the last day of grace, was not reasonable notice.

Verdict for plaintiff.

Quære. See *DeBerdt v. Atkinson*, 2 H. Bl. 336, and *Nicholson v. Goulthit*, 2 H. Bl. 609, as to the necessity of notice in case of known insolvency.

WILSON v. CROMWELL.

If the plaintiff obtain possession of the defendant's acceptance, by a fraudulent practice, he cannot recover upon it.

ASSUMPSIT on acceptance of an inland bill. The defendant

proved that upon the assumption of J. H. Barney in writing, to pay the debt, the acceptance was given up by A. & W. Bowyer to the defendant to be cancelled. That afterwards, the plaintiff, under pretence of a wish to see the bill, to calculate the interest upon Barney's assumption, got possession of it, and then gave up to Barney his assumption, and insisted upon keeping the bill.

Mr. Baker, for the plaintiff, contended that A. & W. Bowyer, to whom the bill was sent for collection, were only special agents to receive the money of Cromwell, and, in default of payment, to bring suit. That if such was the only authority of the Bowyers, and they gave it up without any other consideration than J. H. Barney's assumption, they exceeded their authority, and it was improperly obtained; and therefore it was proper in the plaintiff to get possession of the bill in the manner he did. And that it would support the action; and prayed the instruction of the Court to that effect. Esp. N. P. 109.

But the COURT refused to give such instruction; and upon the prayer of *Mr. Morsell*, for the defendant, the COURT instructed the jury that if they should be of opinion that the Bowyers came into possession of the bill by authority of the plaintiff for the purpose of collection, and they gave it up to the defendant to be cancelled, without any fraud on the part of the defendant, and the plaintiff afterwards obtained possession of the bill by a fraudulent and deceitful practice, the plaintiff could not recover upon it. And that if they should be of opinion that the note was fairly given up by Bowyer to the defendant to be cancelled, and the plaintiff obtained possession of it by any false pretence, it would be evidence of a fraudulent obtaining of the possession.

UNITED STATES v. B. W. PEACOCK.

A venire may be postponed.

In an indictment for forging a bill in the name of a fictitious drawer and indorser, it is not necessary to state any real subsequent indorsements. They are no part of the bill. The indorsement by the prisoner may be given in evidence to prove his intent to defraud, although such indorsement be not set forth in the indictment. The omission of the words "account of" was fatal to the indictment. After jury sworn the Court will not quash the indictment. The prisoner has a right to a verdict.

INDICTMENT for forgery.

A venire was ordered to this day Thursday, January 17, 1805, and upon request of the prisoner the trial was postponed until Monday next; whereupon the jurors summoned were ordered to attend on Monday. The like was done in the case of *United States v. Ray & Williams*, at last term.

This indictment was for the forgery of a foreign bill of exchange in the name of a fictitious drawer and payee and indorser, with intent to defraud Sperry & Barnes, to whom the prisoner had sold the bill and indorsed it.

Mr. P. B. Key, for the prisoner, objected to the bill being given in evidence; it being indorsed by the prisoner and W. Thornton, and by Crow, Wright & Co., and the indorsements not being set forth in the indictment.

Mr. Jones, for the United States. The indorsement is no part of the bill. As between the indorser and indorsee the indorsement is the drawing of a new bill; and as between the holder and the drawee it is only an assignment. In setting forth the intent to defraud any party, it is not necessary to set forth the manner; but the general intent is sufficient. This appears clearly from all the authorities. *Gilbert's (Lofft) Ev.* 690; *King v. Powell*, 2 W. Bl. 787, S. C.; *Leach Cr. L.* 90; *Ca.* 43, S. C. The manner is matter of evidence.

Forgery at common law may be of an order to pay money. An objection was taken, in that case, that the indictment did not set forth that J. Ward had alum of the Duke of Buckingham in his hands whereby it would appear that the Duke of Buckingham could be injured by the draft. But it was held not necessary: if the Duke of Buckingham might be defrauded thereby, it was sufficient to constitute the crime of forgery at common law. *Rex v. Ward*, *Ld. Raymond*, 1461; *S. C.* 2 Str. 746.

Mr. Key. The drawer and drawees are fictitious. If I draw a bill in the name of a fictitious drawer and drawee, and keep it in my pocket it is no offence; for it cannot be with intent to defraud persons not existing; no intent to defraud could be alleged until it was indorsed; the intent must be proved by acts; until indorsed there can be no evidence of the intent to defraud Crow, Wright & Co.; the intent did not commence until the bill was indorsed. The forgery in this case, if it exists, did not exist until it was indorsed and thrown into circulation with intent to defraud some person. It cannot appear to be a criminal act unless it be stated in the indictment that the bill was thrown into circulation. The indictment states that the bill was payable to the order of R. W. Peacock; and does not state that R. W. Peacock even appointed to whom it should be paid; and therefore there was no person who could receive the money; the bill had no operation until indorsed by R. W. Peacock. If the bill had been drawn in the name of a real person, then it might have been criminal; but being in a fictitious name, the indictment must show the facts by which it shall appear that injury could arise to some person. Instruments in indictments must be set forth *in*

hæc verba; if the omission of a letter makes it a different word, it is fatal; *a fortiori*, the omission of the indorsement, which indorsement constitutes the essence of the offence. McNally, Ev. 511, 513.

R. W. Peacock was a party on the face of the bill; and it was necessary (in order to show that the fact was criminal) to state his indorsement. This indorsement was essential to the negotiability of the bill. Upon this indictment they have charged the forging a bill never negotiated; and which without negotiation is an innocent paper. The case in Lord Raymond, as to forgery at common law, is not law. 2 McNally, 637. It was decided since the colonization of Maryland. By the common law there could not be a forgery of a bill of exchange. There is a difference between forging the name of a real person, and putting in a fictitious name; this cannot be to the injury of the fictitious person; but in the former case it may be to the injury of the real person; in the case of a fictitious person it can injure no one until indorsed; before indorsement it is an innocent act.

Mr. Jones. The only question is whether the indorsement constituted a part of the bill; the omitted indorsements are true, and therefore it is not necessary to state them. If the bill was forged with intent to defraud, although it might have been kept in his pocket and never negotiated, it is sufficient to constitute the offence. The case of a forged lease and release, (*Rex v. Crooke*, 2 Strange, 901,) which were imperfect and therefore inoperative, was held to be a case of forgery; the intent being proved. It is not necessary to state that the forged bill was published. *Rex v. Ward*, Ld. Raym. 1461.

The Court was of opinion that on the first count, in which the offence charged is the forging of the bill with the intent to defraud some person therein mentioned, this intent may be proved by after circumstances, without their being set forth. The indorsement of the bill by the prisoner is one of those circumstances, and is not a part of the bill; evidence may therefore be offered of the making of the bill produced by the Attorney of the United States, notwithstanding the indorsements are not set out in the indictment.

Mr. Key objected to the bill going in evidence under the indictment, it having the words "account of" in it, which are not in the bill set forth in the indictment. This variance was admitted to be fatal.

Mr. Jones then moved the Court to quash the indictment; but

The Court refused to quash it, being of opinion that the prisoner had a right to a verdict. Verdict for the prisoner.

Mr. Jones, after verdict, renewed his motion to quash the indictment.

ment: Granted; no objection being made. — The prisoner was afterwards at the same term convicted upon another indictment, for a similar forging of another bill, on the trial of which the same objection was taken, that the real subsequent indorsements should have been set forth in the indictment. But the objection was again overruled by the Court. To show that a fictitious bill may be forgery, the following cases were cited: *Ann Lewis's case*, Foster, Cr. Law, 116; *Bollard's case*, Leach, 97, Ca. 47; *Logan's case*, Leach, 503, Ca. 197; *Tuft's case*, Leach, 206, Ca. 88; *Taylor's case*, Leach, 255, Ca. 106, and *Moffat's case*, Leach, 483, Ca. 190.

ASHTON v. FITZHUGH *et al.*

A declaration in debt for “\$103 $\frac{1}{2}$, or 31 pounds Virginia,” is bad on special demurrer. It must be for a sum certain.

SPECIAL demurrer; because the declaration is that defendants render to plaintiff \$103 $\frac{1}{2}$, or 31 pounds of Virginia, which they owe and detain; which is uncertain, not being positive, nor certain what pounds are meant, whether of tobacco or any thing else. It was also suggested by *Mr. Caldwell*, that it was uncertain because it stated that the defendants were bound, &c., and there are no defendants until after plea or defence taken.

The writ was against Philip and McCarthy Fitzhugh, to answer to Henry Alexander Ashton, in a plea that they render to him “one hundred three dollars, thirty-three one third cents, or thirty-one pounds of Virginia, which they owe and detain.”

The declaration was that H. A. Ashton complains of Philip Fitzhugh and McCarthy Fitzhugh, late of the district and county, aforesaid, yeomen, who were summoned to answer in this behalf of a plea that the said defendants render the said plaintiff one hundred three dollars, thirty-three one third cents, or thirty-one pounds of Virginia, which they owe and detain; for that the defendants, on 20th March, 1797, at &c., by their certain writing obligatory of that date, sealed with their seals, and now here exhibited, promised to pay the plaintiff on or before the 25th of December thereafter, sixteen pounds ten shillings of Virginia, equivalent to fifty-five dollars, for the hire of negro Charles, with suitable clothing, victuals and taxes, to the payment whereof they bound themselves in the penal sum of thirty-one pounds of Virginia, equivalent to one hundred three dollars, thirty-three one third cents; and the plaintiff avers they did not pay the said sixteen pounds ten shillings, or fifty-five dollars, according to the tenor of the said writing, whereby action accrued to have the said

Reeves v. Pye.

penal sum; yet though often requested, the defendants have refused and still refuse to pay the said thirty-one pounds, or one hundred three dollars, thirty-three one third cents, to the damage of the plaintiffs five hundred dollars, wherefore they sue, &c.

The COURT was of opinion that the declaration is too uncertain, but gave leave to amend on payment of costs of the term and a continuance if required by defendant.

Mr. Woodward for the plaintiff.

Mr. Caldwell for the defendant.

DOUGHERTY AND WIFE v. BENTLEY.

A declaration in slander may be amended by adding a new charge, on payment of costs and continuance.

MOTION by the plaintiff to amend the declaration in slander, by changing the words from a charge of being a whore, to that of theft. Granted, on payment of all antecedent costs, and also continued at costs of plaintiff, he having permitted his witness to depart, upon the expectation that the trial of Peacock would have taken up the whole day.

Ex parte JAMES SAUNDERSON.

To entitle an alien to be naturalized, his residence in the United States for five years must be a continued residence.

APPLICATION to be naturalized.

Affidavit of William Hodgson, that Saunderson came to this country in October, 1797, and continued to reside here until 1800, when he went to England, and returned in April, 1801. In the fall of 1801, he went to England again, and returned in 1802; that he had since continued to reside in Alexandria.

The COURT refused to admit him, because he had not continued to reside, according to the Act of 1804, [2 Stat. at Large, 192,] and had not made a previous declaration of his intent according to the Act of 1802, [2 Stat. at Large, 153.]

THOMAS COURTNEY REEVES v. ELEANOR PYE.

Acts done by the vendor alone, will not take a verbal sale of land out of the Statute of Frauds.

THE case in evidence was this: — The Rev. Francis Neale, as the agent, and at the request of the defendant, wrote a letter to

the plaintiff, residing in Charles county, (Maryland,) to know the terms on which he would sell a certain house and lot in Georgetown; and afterwards, at her request, made a verbal agreement with him for the purchase, which was not reduced to writing. Mr. Neale requested the plaintiff's agent to have a deed drawn up, to be executed by the plaintiff to Mrs. Pye, which was done and tendered to her, but she refused to accept it. The deed was defective in not having an *habendum* and a warranty of title, and was not so acknowledged as to pass real estate in Georgetown. The plaintiff also offered to deliver to her the possession, which she also refused; whereupon he brought this action at law for the price agreed upon.

The cause was argued at last term by *Mr. J. F. Mason*, for the plaintiff, and *Mr. P. B. Key* for the defendant.

January 26, 1805, CRANCH, J., delivered the opinion of the COURT, as follows (KILTY, C. J., having been absent at the last term, when the cause was argued): —

The questions made upon this state of the case are, 1. Whether a note in writing has been signed by Mrs. Pye or by any person authorized by her to sign; 2. Whether, if there has been no note in writing, there has been such a part performance of the contract as to take it out of the statute; 3. Whether this statement of the case is such an admission or confession of the parol agreement, without any allegation of fraud, as to take the case out of the statute.

The 1st question seems to be excluded by the admission that "the contract was altogether verbal, of which no note in writing was made." At least, it is an admission that there was no note in writing before the writing of the deed at the request of the plaintiff, and the insertion of the defendant's name as bargainee, at her request. The deed being written by the plaintiff's agent, and executed by the plaintiff, is certainly a sufficient note in writing, to bind him; but unless it was signed by the defendant it cannot bind her. *Hatton v. Gray*, (36 Car. 2,) 2 Ch. Ca. 164; 1 Fonb. 165, note (c.); *Hawkins v. Holmes*, 1 P. Wms. 770; and *Stokes v. Moore*, in Cox's note to 1 P. Wms. 770. These cases also show that the insertion of the defendant's name, at her request, is not equivalent to signing by her. It is clear then, that there was no note in writing, signed by the defendant, or by her authority.

2d. Has there been such a part performance as will take the case out of the statute? The acts alleged to be in part performance, are all the plaintiff's acts, and consist of the execution and tender of a deed (which is informal, for the want of the *habendum* and of a warranty to the bargainee, and can pass no estate for want of a proper acknowledgment,) and an offer to deliver possession of the

property. Both the deed and the possession were refused by the defendant. The case of *Hawkins v. Holmes*, 1 P. Wms. 770, is decisive that these acts are not such a part performance as will take the parol agreement out of the statute. The words of the Lord Chancellor are remarkable. "Unless in some particular cases, where there has been an execution of the contract by entering upon and improving the premises, the party's signing the agreement is absolutely necessary for the completing of it; and to put a different construction upon the act would be to repeal it. As to what has been insisted on in relation to the plaintiff, the vendor's executing and registering the deeds, this indeed looks artful on the plaintiff's side, but is all of it immaterial, with respect to the defendant, to whom the other could not convey or vest an estate in him against his will. It is true, the plaintiff's having registered the conveyance, may put a difficulty on him how to get back the estate; but it being his own doing, and with a design to fasten the estate on the defendant, he must thank himself for it."

3. Is this statement of the case such an admission of the parol agreement as to take it out of the statute? Perhaps the question intended to be submitted to the Court would have more properly come before them upon a demurrer to the evidence. If it is to be so considered, this last point cannot arise. What is the admission? It is only an admission of the evidence given on the trial, and therefore ought to be considered as a demurrer. And the question is whether, upon that evidence, the plaintiff has a right to recover. I am clearly of opinion that he has not. 1. Because there is no note in writing signed by the defendant or by her authority. 2. Because there is no evidence of any act of part performance by the defendant, or of her acceptance of any act of part performance by the plaintiff. 3. Because the case stated is only an admission of the evidence.

BANK OF COLUMBIA v. G. FRENCH'S EXECUTRIX.

Counsel may testify as to facts not communicated to them in confidence by their clients.

The maker of a note is a competent witness for an indorser.

The grantor, in a deed collaterally introduced as evidence in a cause *inter alios*, may be a witness to prove that the deed was fraudulently obtained.

An indorser, for the accommodation of the maker of a note, is not entitled to strict notice unless he has actually sustained damage by the want of notice.

An indorser, for the accommodation of the maker, cannot object the want of consideration to an action by the holder.

ASSUMPSIT on a negotiable promissory note for 1400 dollars, made October 10, 1798, by W. M. Duncanson, payable to, and in-
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dorsed by, G. French, due 9 and 12 December, 1798. On the 15th December, 1798, F. Munroe (a notary-public,) demanded payment of Duncanson, and protested the note. The note was made for accommodation of W. M. Duncanson. G. French died Friday, the 14th December, 1798, and was perfectly in his senses in the morning of that day. All the parties resided in Georgetown and Washington.

Mr. Gantt, counsel for the defendant, was examined as a witness for the plaintiffs. He had had a conversation with the president of the bank, which he related to the defendant's agent, and he was requested by the plaintiff's counsel to state the reply of the defendant's agent. This communication was made by the president of the bank to the witness, as counsel for the defendant, and the answer of the defendant's agent to the witness was made to him as counsel, but he did not conceive the answer of the defendant's agent to be made in confidence. He did not recollect whether he even communicated the answer to the president of the bank, but did not consider himself as restrained from communicating it.

The COURT admitted the evidence to be given; not considering it as a case within the rule respecting counsel and client.

W. M. Duncanson, the maker of the note, being called as a witness for the defendant, *Mr. Mason*, for the plaintiffs, objected, because no party to a negotiable paper is to be allowed to invalidate the instrument. *Walton v. Shelly*, 1 T. R. 296; *Jordaine v. Lashbrook*, 7 T. R. 601; Esp. N. P. 708; Peake, L. E. 128. *Mr. Gantt* cited Esp. N. P. 708.

The COURT admitted W. M. Duncanson to be sworn and give evidence, saying that *Walton v. Shelly* was overruled by *Jordaine v. Lashbrook*.

The plaintiff having introduced a deed from Duncanson to Ray to show the fact of Duncanson's insolvency, the defendant called Duncanson as a witness to prove that that deed was obtained by fraud, and without consideration, and so the inference derived therefrom not correct.

The COURT admitted W. M. Duncanson to testify as to the grounds upon which that deed was given.

FITZHUGH, J., *contra*, said: It is a general principle, that a man is estopped to deny his deed. It is also a general rule, that a man shall not be permitted to do that indirectly which he is forbidden to do directly. There is no case in which it has been allowed as to a sealed instrument. The case of *Jordaine v. Lashbrook* was upon an accommodation note.

Mr. Mason prayed the Court to instruct the jury, that if they should be satisfied that this note was indorsed by G. French, without any valuable consideration passing from him to any per-

son for the same, merely to accommodate W. M. Duncanson, the maker of the note, and to give him a credit with the plaintiffs for the amount thereof, and that the plaintiffs received the same with a knowledge of its having been so drawn and indorsed; that if they are also satisfied that John Weems was the agent of the defendant, and that he had notice of the dishonor of the note in January, 1799, and then conversed with and endeavored to make arrangements with the plaintiffs for the same, and are also satisfied that G. French, in his lifetime, and his executrix, or his estate since his death, have suffered no loss or injury from the circumstance of this note not having been demanded of the drawer before the 15th December, 1798, or of notice not having been given to the indorser, or his executrix, of the dishonor of the note, other than as above stated, that such laches and neglect of the plaintiffs as to a demand on the maker, and in not giving other notice to the indorser of the said note, does not debar and take away their right to recover upon this note against the present defendant. *De Berdt v. Atkinson*, 2 H. Bl. 336, and *Nicholson v. Gouthit*, Id. 609; Chitty, 86, 87, 89, 101. Mr. Mason admitted that the *onus probandi* of showing that the indorser has sustained no damage by want of notice, lies on the plaintiffs. *Nicholson v. Gouthit*, 2 H. Bl. 609. An indorsed promissory note is a bill of exchange. If the drawer of a bill has no funds in the hands of the drawee, no notice is necessary to the drawer, of the dishonor of the bill. Chitty, 17, 169, 170; Kyd, 125. The fact of insolvency, in the case of *De Berdt v. Atkinson*, does not differ it from this case, because the insolvency and knowledge of that insolvency by Atkinson was only a fact to show that he could not suffer by want of notice. In the present case it is expressly proved that the defendant received no injury by want of notice, and therefore is precisely within the reason of the case of *De Berdt v. Atkinson*.

Mr. Mason attempted to reconcile the cases of *DeBerdt v. Atkinson*, and *Nicholson v. Gouthit*. The defendant, Gouthit, actually sustained a loss in consequence of want of notice, because the funds which he held when the note became payable, were withdrawn before the demand was made, and therefore if compelled to pay the note he would be injured. Chitty, (p. 87,) does not notice the cases as contradictory, although he cited both in the same page, and states the law of *DeBerdt v. Atkinson* as absolutely settled. Christian's Notes to Bl. Com. 2d vol. 470, note 26th.

Mr. Morsell, *contra*. The indorser is a surety, and liable only in a qualified manner. There is a difference between the acceptor of a bill and the maker of a note, and between the in-

dorser of a note and the drawer of a bill. The indorser indorses on the credit of the maker; and the reason of notice is that the indorser may immediately resort to the maker and get security; but in the case of a drawer of a bill who has no funds in the hands of the drawee, the drawer has no right to expect the bill to be honored or paid. Esp. N. P. 34. In the case of a drawer of a bill without funds, the drawer is the principal debtor, and is not in the nature of surety. *Robertson v. Vogle*, 1 Dal. 252. Although it may be an accommodation note, yet there is the same reason for notice as if it were for a real debt. *Tindall v. Browne*, 1 T. R. 167.

Mr. Gantt, on the same side. This was an extraordinary transaction of negotiation at the Bank of Columbia. There is a difference between an indorsed promissory note and bill of exchange. *Primâ facie* it is a *bonâ fide* transaction. Notice must be waived by some agreement. The maker of a promissory note is absolutely bound to pay. The contract of the indorser is conditional only. The holder undertakes to do certain things, and if he omits these he waives the liability of the indorser. Kyd, 109, 111, 117; 2 Bl. Com. 470. In the case of *DeBerdt v. Atkinson*, the decision was upon the ground of the insolvency of the maker being known to Atkinson at the time of the indorsement; so that Atkinson undertook to pay at all events. By not demanding the money of W. M. Duncanson, on the day it became due, the plaintiffs have given credit to W. M. Duncanson. The indorsement is only a conditional contract, and the conditions have not been complied with. To make him liable without demand or notice, is to create a liability on the defendant which he never assumed. The case of *DeBerdt v. Atkinson* is overruled by that of *Nicholson v. Gouthit*. Notice must be stated in the declaration, and it is error if not stated; it must therefore be proved. There was no consideration between the plaintiff and defendant, unless the payment to Duncanson can be considered as a payment to French; and if the money was thus paid to French, and by French to Duncanson, then a consideration passed from French to Duncanson, and Duncanson had funds in his hands, upon which French could draw.

Mr. Mason. Until French repays the money to the bank, he cannot support an action against Duncanson.

The COURT gave the instruction, as prayed by Mr. Mason.

CRANCH, J., *contra*, who delivered his opinion to the following effect. This is undoubtedly a question of great importance as it regards the interests of the commercial part of the community; for it is of vast importance that the several obligations of parties to negotiable paper should be certain and well known; and I therefore regret extremely, that I am obliged to give an opinion

during the trial of the cause, without that degree of examination and reflection which it merits, especially as I am so unfortunate as to differ from my brethren on the bench. In these circumstances, I cannot say that I do not deliver my opinion with some degree of doubt, although the preponderance of my judgment is at present against giving the direction as prayed.

I had, at first, considerable doubt whether the strict rule of notice was not to be considered as *summum jus*, which could only be required in case of the failure or insolvency or death of the principal debtor, so that the loss must fall upon one of two parties who were contending *de damno evitando*. Some of the earlier cases seem to have been decided upon this principle, and in the greater number of cases respecting the liability of the drawer of a bill of exchange and indorser of a promissory note, the judges have qualified the rule with the proviso that some of the parties have become insolvent. *Mogadara v. Holt*, 1 Show. 318; *Hart v. King*, 12 Mod. 309; *Borough v. Perkins*, 1 Salk. 131; *Tussell v. Lewis*, *Ld. Raym.* 744; *Lambert v. Oakes*, *Ld. Raym.* 443; *Gee v. Brown*, *Strange*, 792; 2 *Burr.* 674; *Heylin v. Adamson*, 2 *Burr.* 674.

But from the expressions of judges in later cases, I am inclined to think that my first doubts on this subject were groundless, and that the necessity of notice is a part of the law merchant attached to a bill of exchange, or rather is a part of the contract itself.

The question, on which side does the justice of this case lie, depends upon the question what was the contract of the indorser; for it is not just that any man (especially a mere surety) should be held liable upon a contract further than he has consented to bind himself. If his contract was conditional, he cannot be absolutely bound until the condition has been performed.

What then was the contract which the defendant's testator entered into by indorsing the note? By the law of Maryland, which must decide this case, and which on this subject is precisely the same as the law of England, an exact analogy exists between an indorsed promissory note, and an accepted inland bill of exchange. When a promissory note, payable to order, is indorsed by the payee, it is, in truth, an inland bill of exchange drawn by the payee in favor of the indorsee, upon the maker, (his debtor by the note,) and by him accepted. Hence the law respecting both kinds of paper is the same.

The contract of the first indorser of a promissory note is the same with that of the drawer of a bill of exchange. It is an express, not an implied contract. An implied contract is that which the law (to prevent a failure of justice) presumes the parties to have made, where they have failed to make an express contract

Bank of Columbia v. French's Executrix.

for themselves, and courts will vary the terms of such implied contract, according to the principles of natural justice. By writing his name on the back of the note, the indorser entered into an express contract, the terms of which are as well known by reference to the law merchant, as if they had been written at large on the note. He does not thereby bind himself to pay at all events. He only says to the holder, if you use due diligence in demanding the money of the maker and he refuses to pay it, and if you give me reasonable notice thereof, I will pay you. It being then a part of the express contract between the parties, that the holder should, in reasonable time, demand the money of the maker and give notice of non-payment to the indorser, before the latter can be charged, upon what principle can a court of justice dispense with the performance of those precedent conditions? There has been no case on a promissory note cited in which it has been dispensed with, except the case of *DeBerdt v. Atkinson*, 2 H. B. 336, and there it was done because the maker of the note was known by all the parties to be insolvent at the time of making and indorsing the note, and therefore the contract of the indorser in that case was not conditional, but absolute. But the authority of that case although attended by such special circumstances, is shaken, if not overruled, by the case of *Nicholson v. Gouthit*, in the same book, where notice to the indorser of a promissory note was held necessary, although the insolvency of the maker was known to the indorser before the note became payable, and although he had indorsed it for the accommodation of the maker, and merely to obtain him a credit. The latter is, in its circumstances, more like the case now before the Court, than that of *DeBerdt v. Atkinson*. It has been contended, for the plaintiffs, that the principle decided by that case was, that notice to Atkinson was not necessary, because it could be of no benefit to him, and that the insolvency of the maker was only a circumstance showing that such notice could not have been beneficial. But the court, in giving their opinion relied, not on the actual insolvency, but the knowledge of the insolvency, by all the parties at the time of making and indorsing the note, whereby it appeared that the defendant had not annexed the usual conditions to his contract as indorser, but had waived them, and that the waiver was also known to the plaintiffs.

It has also been contended, by the plaintiff's counsel, that in the case of *Nicholson v. Gouthit*, it appeared that the defendant had suffered injury by the want of notice. The case was that Burton, the other indorser, had put into the defendant's hands funds to meet the payment of the note, but the note not having been demanded when due the defendant had paid away those funds. It

may be answered that if the defendant was not entitled to notice, he paid away those funds in his own wrong, and therefore if any damage arose to him in consequence, it could not make notice necessary. It may also be observed, that the court, in giving their opinion did not notice this circumstance as a ground of that opinion, but the chief justice seems to exclude a presumption of that kind, because he says the justice of the case was with the plaintiff, which could not be true if the defendant had suffered a damage imputable to the laches of the plaintiff. The only ground upon which the Court rested their opinion was that the form of guaranty which the parties had adopted required due notice to the indorser, and therefore, although the justice of the case was with the plaintiff, they could not dispense with such notice. Upon this ground the opinion is certainly inconsistent with the case of *DeBerd v. Atkinson*; for in the latter case the same form of guaranty had been adopted, yet that circumstance was not deemed sufficient to render notice necessary. But in the other circumstances of the two cases there was a material difference. In *DeBerd v. Atkinson* the insolvency of the maker was known to all the parties at the time of making and indorsing the note; but in the other case it does not appear that the maker was insolvent, but only embarrassed, at the time of making and indorsing the note, although he became insolvent before the note became payable, which was eighteen months after date. It did not appear, therefore, that the indorser had, at the time of indorsing, waived the usual conditions annexed to the liability of an indorser. It may also be observed that in both those cases the question arose upon the insolvency of the makers of the notes. In the present case no such insolvency is stated in the prayer to the Court. But if those cases will not support the plaintiff's action, they rely on the cases in which it has been decided that a person drawing a bill of exchange without funds in the hands of the drawee, is not entitled to notice. I admit that an analogy exists between an indorsed promissory note and a bill of exchange; but that analogy is not perfect until the bill of exchange is accepted. No case has been cited in which notice has been deemed unnecessary, if the bill has been accepted, and I recollect but one case of the kind, which is that of *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652, which will be noticed presently. In all the prior cases acceptance had been refused.

It is admitted that cases have decided that if the drawer has neither funds in the hands of the drawee before the bill becomes payable, nor a right to draw, he is not entitled to notice; and the reason is because he cannot expect the bill to be accepted and paid, and therefore practises a fraud upon the holder, and be-

cause he cannot suffer any injury by the want of notice. These reasons extend simply to the case of a drawer who has no right to draw, and the bill is not accepted. For if the drawee has promised to accept the bill, then the drawer had a right to expect that his bill will be accepted; and he has practised no fraud upon the holder; and notice of non-acceptance, and *a fortiori* notice of non-payment, if the bill has been accepted, may be very material to the drawer, as he would thereby be liable for damages, interest and costs, which he would have a right to recover over against the drawee, who had thus violated his faith in not honoring the drawer's bill according to promise; and by the want of notice he may lose his remedy against the drawee by his insolvency. This may be the case where the drawer draws the bill for his own accommodation without funds, and the drawee engages to accept it to give the drawer a credit. Even in that case then, the reasons given for dispensing with notice, in the cases cited, do not apply. But that is not the present case. It is contended that this is an accommodation note, that the indorser (the defendant's testator) never gave any valuable consideration for it, and therefore he stands on the same ground as a drawer without funds.

Let us then consider it as a bill of exchange. It is a bill drawn by the defendant's testator on W. M. Duncanson (and by him accepted for his own accommodation) in favor of the plaintiffs. It is not like the case of a bill of exchange drawn for the accommodation of the drawer which I have just stated, and if the reasons for dispensing with notice did not apply to that case, much less can they to this. If a bill of exchange be drawn to accommodate the drawee, the drawer has a right to expect it will be accepted, and if accepted has not only a right to expect but to insist, that it shall be paid, precisely in the same manner as if he had drawn upon funds in the regular course of mercantile transactions. He stands precisely in the same situation as if the bill had been so drawn. What is the situation of the drawer in a regular transaction? If his debtor (the drawee) after having agreed to honor the bill refuses acceptance, the holder can immediately call upon the drawer, who, upon taking up the bill, may commence suit against the drawee and recover the principal, interest, damages and costs. So in case of a bill drawn for the accommodation of the drawee; if not accepted, the holder can immediately call upon the drawer, who, upon taking it up, may commence suit against the drawee for the amount of the accommodation he received, with the costs and charges expended by the drawer for his accommodation. Immediate notice of non-acceptance is therefore equally necessary in both cases, a failure of the drawee in either case being equally prejudicial to the drawer. In a regular trans-

action, if, after acceptance, the acceptor refuse to pay, the drawer, after taking up the bill, may commence suit against the acceptor on the bill and recover the principal, interest, damages and costs. So in the bill drawn to accommodate the drawee, if after acceptance (which is the present case) the acceptor refuse to pay, the drawer, after taking up the bill may commence action against the acceptor and recover the principal, interest, damages and costs. If the acceptor in either case should fail, both drawers would sustain precisely the same injury; the one by being unable to withdraw his funds to get an indemnification for the interest, damages and costs; and the other by being unable to get a reimbursement of the principal as well as interest, damages and costs. No two cases can be more parallel. If, then, notice is necessary to a drawer on funds, it is equally necessary to a drawer for the accommodation of the drawee; for *in pari ratione eadem est lex*. To show that the indorser of an accommodation note is not entitled to notice the plaintiff's counsel cited Christian's note to 2 Bl. Com. 470. But the writer of that note refers to no case but *De Berdt v. Atkinson*. The principle may be right (considered in analogy to the cases of drawers without funds and without a right to draw,) when applied to the case of a note drawn to accommodate the indorser, because he is the person who is ultimately to pay without retribution; for if he is compelled to pay in the first instance he can never resort to the maker. Such is the case of the drawer without funds. If he is obliged to pay the bill in the first instance he never can come upon the drawee. In these cases the insolvency of the maker or of the drawee can make no difference to the indorser of the note or the drawer of the bill; and as they are the principal debtors on the note and bill, notice to them can be of no use. But if the principle should be applied to the case of a note indorsed for the accommodation of the maker, it will be applied without the support of any of the reasons which have been alleged to justify the want of notice in the case of a drawer without funds. The only case reported, within my recollection, which has decided that the drawer of an accepted bill is not entitled to notice, is that of *Walwyn v. St. Quintin*, 1 B. & P. 652, and in that case the bill was for the accommodation of the payee, and the action was by the indorsee against the drawer. The acceptor had funds of the payee but not of the drawer. I confess it is difficult to understand the reasoning of the Chief Justice in delivering the opinion of the court, in that case. He says, — "as far as concerns the drawer, it is what it has been called, a mere accommodation." This is true, but it was not for his own accommodation, which seems to me to be the only kind of accommodation which will justify the want of notice. He then proceeds, — "and all con-

sideration of effects of the drawer in the hands of the acceptor may be laid aside." This again is strictly and literally true. But the drawer had a fair pretence for drawing, and the acceptance was on the ground of a fair mercantile agreement. For it is stated that the drawee had actually accepted the bill on the faith of funds put into his hands by the payee to meet the payment. And in the next page his Lordship says: "But it may be proper to caution bill-holders not to rely on it as a general rule, that if the drawer has no effects in the acceptor's hands, notice is not necessary. The cases of acceptances on the faith of consignments from the drawer not come to hands, and the case of acceptances on the ground of fair mercantile agreements, may be stated as exceptions, and there may be possibly many others." In the next sentence, also, he seems to admit that where the drawer has no effects in the hands of the drawee, yet if he has "a fair pretence for drawing" although it is for the purpose of raising money by discount for himself, yet he is entitled to notice. Here then seems to be a difference between the opinion and the judgment of the court which it is difficult to reconcile. He proceeds: "It seems clear that notice can be of no use to him (the drawer); his situation being this, that if the acceptor does not pay, he must; and may then, and not till then, resort to the acceptor to be reimbursed; notice, therefore, can amount to nothing, since his situation cannot be changed." So in the case of a real negotiation, the situation of the drawer is, that if the acceptor does not pay, he must, provided he has due notice. If the Chief Justice meant to say that the defendant, St. Quintin, was absolutely bound to pay if the acceptor did not, it was begging the question. But his argument seems to rest on the ground that the drawer could not resort to the acceptor until he (the drawer) had paid the bill. But notice was necessary to him, that he might know where to apply to take up the bill, before the acceptor shall become insolvent. Notice also might be of use to him, even before payment, as thereby he would take measures to get security from the acceptor, to indemnify himself when the bill should come back to him. His situation would certainly be very much changed by the want of notice, if the acceptor should fail after the bill became payable; for if due notice had been given he might have taken up the bill, and compelled the acceptor to repay him the money.

His Lordship says: "Perhaps, indeed, it (notice) ought never to be dispensed with, since it is a part of the same custom of merchants, which creates the duty; especially as the grounds for dispensing with it, are such as cannot influence the conduct of the holder of a bill, at the time when he is to determine whether he will, or will not give notice; for ninety-nine times in a

hundred, he cannot know whether the drawer have or have not effects in the hands of the acceptor, or for whose accommodation the bill was drawn. It has, however, been resolved in many cases, where the drawer has had no effects in the hands of the acceptor, that notice might be dispensed with." This last position seems to have been taken for granted; but I can find no such cases. In all the prior cases, the bill had not been accepted.

He also says: "Where the drawer has no effects, and has no fair pretence for drawing, or where he draws without having effects intended to be applied in payment, and only for the purpose of raising money by discount for himself, and *a fortiori* for the acceptor, which is this case, it is fairly deducible from the cases which have been resolved, that notice need not be given."

Where the bill is drawn and accepted (without funds) for the accommodation of the drawer, it may be admitted that the drawer is not entitled to notice, without affecting the present case; but it is difficult to conceive why there should be a stronger reason for dispensing with notice to the drawer, where the bill is drawn for the accommodation of the acceptor, than where it is drawn for the accommodation of the drawer. Indeed, in the former case, I can see no reason for dispensing with notice which will not apply to every possible case.

But if this is to be taken as a bill of exchange, can it be said that French, the drawer, had not funds in the hands of Duncanson, the acceptor, before the bill became payable? This action is brought by the plaintiffs, the indorsers of the note, or payees of the bill, against their immediate indorser. They can only support their action, by showing the money to be paid to him or to his use. They paid the money to Duncanson, the maker of the note, or acceptor of the bill. Unless this payment can be applied to French, the indorser, there was no consideration between the plaintiffs and defendant. It is only by considering the money as paid by the plaintiffs to French, and by French to Duncanson, that the plaintiffs can maintain their action. The money, then, which was thus paid, was the funds of French in the hands of Duncanson, upon which French had a right to draw this bill in favor of the plaintiffs. The money in Duncanson's hands, was the fund out of which the note was to be paid, and the non-application of that fund to the object for which it was intended, was a sufficient reason why notice ought to have been given to French, in order that he might get the fund into his own hands, or secure himself against his responsibility.

But, it is said, that in this case it is stated that French has received no injury, by want of notice. This may be truly said, for French has not yet been compelled to pay the money. It

may be answered, that if French was entitled to notice, the fact that he had not received injury by the want of it, would not be sufficient to dispense with it; and such evidence ought not to be received, and if received, ought not to be regarded. Before the plaintiffs can be let in to give such evidence, they must show that French was in the situation of a drawer without funds and without a right to draw, and that notice could not have been of any use to him.

There is another reason why I cannot consent to give the direction as prayed. It appears, by the case stated for our opinion, that the last day of grace on the note was the 12th of December, and that no demand of payment was made upon the maker of the note until the 15th of December. This was giving a new credit to the maker; and although French might be responsible without notice, if due diligence had been used in demanding the money from the maker, yet it is certainly competent for the plaintiffs to release him from that responsibility; and I am not clear that they have not done so by giving this new credit.

The case also states a negotiation between the defendant's agent and the plaintiffs for the adjustment of this note. If that is intended to be argued before the jury, or in the court above, as a waiver of the right to notice, I cannot let it go without also instructing the jury that if they should be satisfied that that negotiation was entered into by the agent without a knowledge of the fact of want of notice, and of the law arising upon that fact, it did not amount to a waiver of the right to notice.

Mr. Gantt then prayed the Court to instruct the jury, that if the jury should be of opinion, from the evidence, that the plaintiffs neither paid nor gave any valuable consideration to the defendant's testator for the note, they could not recover. Kyd, p. 277.

The COURT refused the instruction as prayed, but directed them, that if they should be of opinion that the note was drawn by W. M. Duncanson, and indorsed and delivered by G. French to the plaintiffs, and that thereupon the plaintiffs paid the money to W. M. Duncanson, with the knowledge and assent of G. French, there was a sufficient consideration as between the plaintiffs and G. French.

Mr. Gantt then prayed the Court to instruct the jury, (in substance,) that the money so paid to W. M. Duncanson, was such a consideration moving from French to Duncanson, as to entitle French to due notice of the non-payment, and to make the laches of the plaintiffs in not demanding payment of Duncanson until the 15th of December, a discharge of French from his liability; and that such laches and want of notice, if proved, would discharge him accordingly.

Long v. Oneale.

But the COURT refused to give the instruction. CRANCH, J., *contra*.

Verdict for the plaintiffs, \$1917.¹

LONG v. ONEALE.

An interlineation of an appeal-bond, by inserting the name of a new obligor, and his executing the bond as a surety, without the consent of the other sureties, makes the bond void.

DEBT on an appeal-bond — plea, *non est factum*.

On the trial, *Mr. Key*, for the defendant, prayed the Court to instruct the jury, "That if they should be satisfied, by the evidence, that the bond was signed, sealed and delivered by Mary Sweeny, and by J. T. Frost and the defendant, as her sureties, and was afterwards presented to Cornelius Coningham, (the justice who had rendered the judgment,) for his approbation and acceptance of the sureties, and was by him refused and rejected; and after which rejection was interlined, without the license, privity, and knowledge of the defendant, by inserting the name of Lund Washington, as a co-obligor, who, on the following day, without the privity, knowledge, and consent of the defendant, signed, sealed, and delivered the bond, which was afterwards approved by the justice, then such interlineation and execution of the said bond, by the said Lund Washington, rendered it void as to the defendant, and the plaintiff cannot recover in this suit."

Mr. Key, who argued the cause for the defendant, cited the following authorities, viz.: *Pigot's case*, 11 Co. 27; *Shep. Touch.* 63, 67, 69; *Markham v. Gonaston*, Cro. Eliz. 626; *Esp. N. P.* 223, 224; *Zouch v. Clay*, 2 Lev. 35; *State of Maryland, use of Sim, v. Thomas Gantt*, in the General Court of Maryland, (not reported.)

Mr. Mason, for the plaintiff, cited the Stat. of Maryland, 1791, c. 68, § 5, and *Esp. N. P.* 224.

CRANCH, J., was of opinion that the instruction prayed by *Mr. Key* ought to be given; but KILTY, C. J., being of a different opinion, and FITZHUGH, J., being absent, the instruction was not given.

The defendant took a bill of exceptions, and upon a writ of error, the judgment was reversed by the Supreme Court of the United States. See 4 Cranch, 60.

¹The judgment in this case was reversed by the Supreme Court of the United States. See 4 Cranch, 135.

CARROLL v. FINNAGAN & WATERS.

It seems, that in an action for use and occupation, the plaintiff can recover only for the time of the actual occupation, although there be a parol lease for a whole year at a certain rent, and the tenant voluntarily quits the premises during the year. The parol demise is only evidence, in such an action, of the rate at which the defendant is to be charged for the time of actual occupation.

CASE, for use and occupation. A parol demise for a year from 1st November, 1802, at six hundred dollars per annum was proved. Defendants quitted the house in February, 1803, because the chimneys smoked, so that their lodgers had determined to leave them.

Mr. Mason, for the plaintiff, contended for the whole year's rent.

The COURT (FITZHUGH, J., absent,) were inclined to be of opinion that under this form of action the defendants were liable only for the time they actually occupied the house; and the Stat. 11 Geo. 2, c. 19, § 14, only made the parol demise admissible as evidence of the rate at which the defendants should be charged for the time of actual occupation: The words of the statute being that, "Where the agreement is not by deed, it shall be lawful for the landlord to recover a reasonable satisfaction for the lands &c. held or occupied by the defendant in an action on the case, for the use and occupation of what was held or enjoyed. And if in evidence on the trial of such action any parol demise, or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the quantum of the damages to be recovered."

Verdict for the plaintiff, \$ 290 only.

CORPORATION OF GEORGETOWN v. C. A. BEATTY.

The writ and declaration may be amended by substituting the corporate name of the plaintiff, for "The Corporation of Georgetown," on payment of all costs; and a continuance and leave to plead *de novo*.

DEBT, special demurrer. The plaintiffs had leave to amend the writ and declaration, by stating the plaintiffs to be (instead of "the Corporation of Georgetown") "The Mayor, Recorder, Aldermen and Common Council of Georgetown," that being their corporate name; and by an averment that the bond was made to them by the name of "The Corporation of Georgetown," — on payment of all antecedent costs and continuance, and rule to

 Johns v. Brodhag.

plead *de novo*. See the case of *Tibbs & Co. v. Parrott*, at July Term, 1804; [*ante*, 177.] (FITZHUGH, J., absent.)

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JOHNS *et al.* v. BRODHAG.

Sureties of an insolvent debtor, in a bond for duties to the United States are not entitled to judgment against their principal at the first term.

THIS cause stood on the appearance-docket of this term.

Mr. Morsell, for the plaintiffs, moved for judgment in an action brought to this term on a bond given by the defendant, with the plaintiffs as sureties, to the United States, for duties; the plaintiffs having paid the duties, and the defendant having become insolvent. This suit was brought under the Act of Congress of the 2d of March, 1799, § 65, [1 Stat. at Large, 676.]

Mr. Key, for the defendant, contended — 1st, That sureties are not entitled to judgment at the first term. 2d, That if they have that remedy, it can be used only in cases of such kinds of insolvency as are mentioned in the Act of Congress of the 2d of March, 1799, § 65, [*ut sup.*]

Mr. Mason and *Mr. Morsell*, for the plaintiffs, relied on the words “the like advantage, priority or preference for the recovery,” &c., in page 387. They admitted that the United States could not recover judgment on a bond for duties, but by a jury trial in common form; but contended that the surety who pays the debt of an insolvent principal has a right to a trial at the first term.

THE COURT (FITZHUGH, J., absent,) were of opinion that the surety was entitled only to the priority of payment out of the effects of the insolvent; not to the trial at the first term: Because the clause giving such trial is subsequent to the clause which gives “the like advantage, priority,” &c.; because, by the words of the act, the priority of suit is only given when the duties are due to the United States; because the defendant cannot get a continuance of the cause unless the attorney of the United States be present; and because, in a suit by a surety, many more facts can be pleaded by the defendant than in a suit by the United States — such as the surety had not paid, or an offset, or that he was not insolvent, &c.

The motion was overruled, and the cause took its regular course through the dockets.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1805, AT ALEXANDRIA.

THE UNITED STATES *v.* SAMUEL BARTLE.

In Virginia, upon the plea of not guilty to an indictment for assault and battery, evidence may be given to the jury in mitigation of the fine which they are to assess. The carpenter and bricklayer who are building a house have a right to remove, gently, all persons who come into the building without authority, if they will not depart upon request.

INDICTMENT for assault and battery on George Coryell.

Mr. C. Lee, for the defendant, asked the witness, Preston, whether he had heard Coryell use threats to break up and injure Bartle, or any prior quarrel, in order to discredit the witness Coryell, and to mitigate the fine, which, by the law of Virginia, is to be assessed by the jury.

Mr. Jones, the District Attorney, objected, that it was not a justification, nor could be given in evidence in mitigation of the fine.

But the COURT permitted the question to be asked.

The COURT, at the request of the defendant's counsel, instructed the jury that if they should be of opinion, from the evidence, that Coryell, without right, came into the building on which Bartle was doing the carpenters' work, and upon being requested, refused to go out of the building, then Bartle had a right gently to put him out; and that if Bartle, under such circumstances, did gently put Coryell out, without any unnecessary violence, he was not guilty of an assault in so doing.

Mr. Jones moved the Court to instruct the jury, that if Bartle came into the apartment where Coryell was, for the sole purpose of turning him out of the building, it was an assault.

But the COURT (*nem. con.*) refused to give the instruction as prayed.

The COURT was further of opinion that it was not necessary to prove that Coryell was interrupting the business, or impeded it any way, but that the possession was in the carpenter and bricklayer, and either of them had a right to order away all persons having no right to enter the building; and if they refused to depart, had a right to put them out without using any unnecessary violence.

UNITED STATES v. GEORGE SINGLETON.

The want of the name of a prosecutor upon an indictment for a misdemeanor in Virginia, is not sufficient cause for arresting the judgment.

INDICTMENT for assault on Julia Drake.

Mr. Taylor, for the defendant, moved the Court to arrest the judgment upon the verdict, because the name of a prosecutor was not indorsed on the indictment; and cited the Virginia law, New Rev. Code, 105, c. 74, § 24, 25; p. 346, c. 188, § 2; and the Act of 1802, p. 431, c. 303.

The Court, after taking time to consider, was of opinion that the want of the name of the prosecutor indorsed upon the indictment, is not sufficient ground to arrest the judgment, and overruled the motion. See the *Commonwealth v. Leap*, at April Term 1801, [*ante*, 1.]

ALLISON v. MARK ALEXANDER'S WIDOW.

The plaintiff having proceeded both at law and in equity, must make his election.

ON motion by *Mr. Simms*, for the defendant, the Court ordered the plaintiff to make his election, he having proceeded at law and in chancery, for money due from defendant's testator to plaintiff on partnership account.

UNITED STATES v. JOHNSTON.

An alien cannot be a petit juror, because he cannot be a freeholder; but see the next case, *Young v. Marine Ins. Co.*

In an indictment against one of several who made a joint assault, the acts of the others at the same time may be given in evidence.

INDICTMENT for assault and battery and resisting a collector of militia fines.

A juror, called to be sworn, who was an alien, was rejected by the Court. See New Rev. Code, 101, c. 73, § 12, 29th of November, 1792.

Mr. Swann, for the defendant, objected to evidence of what was done by Glover in company with Johnston, at the time of the assault and battery.

Mr. Youngs, on the same side. The United States have chosen to consider it as two separate assaults by indicting them separately.

PER CURIAM (*nem. con.*) The conduct of every person joining in

Cox v. Simms.

the assault may be given in evidence. The evidence offered is admissible.

JAMES YOUNG v. MARINE INSURANCE COMPANY OF ALEXANDRIA.

The qualifications of jurors in this Court must be the same as in the county courts of Virginia.

It was yesterday decided (CRANCH, J., absent,) that the qualifications of jurors in this Court shall be such as are required for jurors in the county courts of Virginia; and not those required for jurors in the district courts of Virginia. Jurymen therefore need not hold a freehold estate, but must possess personal property to the value of 150 dollars; but see the next preceding case, *U. S. v. Johnston*.

SMITH v. STOOPS.

After office judgment the Court will not receive a plea of the Statute of Limitations.

MR. EDWARD J. LEE moved to set aside the office judgment by pleading the Statute of Limitations — refused; the COURT saying that it had always been refused. See *Hooff v. Herbert*, November, 1803, (not reported.)

In the case of *Carne & Slade v. McLean*, at this term, [*post*,] the COURT ordered the plea of limitations to be struck out, it having been filed after office judgment.

FITZHUGH, J., *contrà*.

COX v. JESSE SIMMS.

The holder of a bill before protest, is not affected by a settlement between the drawer and payee.

In an action upon protest for non-payment, it is not necessary to show a protest for non-acceptance, nor to give notice of non-acceptance.

Reasonableness of notice is to be decided by the jury.

In an action by the payee of a bill having two subsequent indorsements in full, it is not necessary for the plaintiff to show a new assignment to himself.

If the drawer has no funds in the hands of the drawee he is not entitled to notice of non-payment.

ASSUMPSIT. Indorsee against drawer of a foreign bill of exchange for £200 sterling, drawn by Simms on Stewart, in favor of Fletcher & Otway, and by them indorsed to Cox, dated 10th of September, 1797, at sixty days sight; presented 14th December, 1797, protested for non-payment 15th February, 1798.

Mr. E. J. Lee, for the defendant, offered evidence of a settle-

ment between Fletcher & Otway and Simms, subsequent to the date of the bill, but it was rejected by the Court; the bill appearing to have been indorsed to the plaintiff before dishonor. *Mr. Lee* prayed the Court to instruct the jury that the plaintiff cannot recover unless he shows a protest for non-acceptance.

The COURT stopped *Mr. Taylor*, who was about to reply; and said they had frequently decided the point and overruled the objection on the authority of *Brown v. Barry*.

Mr. Lee then prayed the Court to instruct the jury, that reasonable notice of the non-acceptance ought to be proved.

The COURT refused to give the instruction.

Mr. Lee required evidence of notice of non-payment.

Mr. Taylor, for the plaintiff, produced the defendant's letter, dated 21st August, 1798, promising to pay the bill, and contended that the jury were to decide whether the notice was reasonable; *Mackie's Ex'or v. Davis*, 2 Wash. 231, Judge Carrington's opinion.

Mr. Lee, *contrà*, cited *Stott v. Alexander*, 1 Wash. 331 and *Wood v. Lutterel*, 1 Call, 232, that the reasonableness of notice was a question of law arising on the facts.

The COURT decided that the reasonableness of notice was to be decided by the jury.

CRANCH, J., *contrà*.

Mr. Lee then objected that as the bill is indorsed by Cox (the plaintiff) to Tucker and by Tucker in full to William Murdock, the plaintiff cannot recover unless he show a new assignment to him, (*Gorgerat v. McCarty*, 2 Dal. 144); but the Court overruled the objection.

The COURT, at the prayer of the plaintiff's counsel, instructed the jury that if they were satisfied, by the evidence, that Simms had no funds in the hands of Stewart, notice of non-payment was not necessary.

MILBURNE v. BYRNE.

An averment that John Leonard, "for a certain price," agreed to serve the plaintiff, is supported by evidence that John Leonard, in consideration of eight guineas paid by the plaintiff to a third person, agreed to serve the plaintiff.

In an action for enticing a servant, the declarations of the servant cannot be given in evidence.

A contract made in this country does not create such a relation of master and servant as will authorize a justice of the peace to compel a specific service, and to inflict stripes for disobedience, under the law of the 26th of December, 1792, c. 132; but may give the master such a right to the service as will enable him to recover damages for enticing away the servant; and employment is *prima facie* evidence of enticement.

CASE for enticing a servant. The plaintiff's declaration stated

that John Leonard, (the servant,) for a certain price agreed to serve the plaintiff for eight months. The plaintiff produced an indenture by which, in consideration of eight guineas paid by the plaintiff to Alexander Smith, Leonard agreed to serve the plaintiff for eight months.

Mr. Taylor, for the defendant, objected that the proof varied from the declaration. The declaration means a certain price to be paid, and not a price paid; it means paid to Leonard and not to Smith.

But the COURT (KILTY, C. J., absent,) overruled the objection, and said there was no variance.

The Court refused to admit the declarations of the servant to be given in evidence.

Mr. E. J. Lee for the plaintiff, moved the Court to instruct the jury that the indenture constitutes the relation of master and servant, so as to make it actionable to entice away the servant; and also so as to come within the Act of Assembly of Virginia, which authorizes a justice of the peace to compel a specific service, and to whip the servant for running away. It is a contract to serve, made in a foreign country. He came into the country "under contract to serve another," as expressed in the Act of Assembly of Virginia, c. 132, p. 247.

Mr. Swann, contra. If there was a contract in Ireland, it is not the contract on which this action is brought. The contract with the plaintiff was made in this country.

The COURT (FITZHUGH, J., absent,) was of opinion that the indenture being executed here, the servant was not such a servant as is described in the Virginia Laws, c. 132, and therefore the whipping by the order of the justice was illegal; but still it was such a contract for service as would maintain this action if Leonard was enticed away by the defendant.

Mr. Lee then prayed the Court to instruct the jury, that if Leonard had deserted the service of Milburne, and if the defendant, knowing that fact, employed and harbored Leonard, it is sufficient evidence to the jury that the defendant enticed Leonard away. Esp. N. P. 646; *Fawcet v. Beauves*, 2 Lev. 63.

Mr. Taylor, contra, cited *Blake v. Lanyon*, 6 T. R. 221, and contended that the employment of the servant, by the defendant, was not evidence of enticing, although the defendant knew that the servant had left his master.

The COURT was of opinion that it was presumptive evidence against the defendant, from which the jury might infer that he enticed the servant away.

MCALLISTER v. DOUGLAS & MANDEVILLE.

The value of the article on the day the cause of action accrued, is the true measure of damages for not delivering it according to contract.

ASSUMPSIT on a special contract respecting flour.

Mr. Lee, for the defendant, prayed the Court to instruct the jury, that they ought to regulate the damages according to the price of flour on the day when the flour ought to have been delivered, and cited the following cases: *Groves v. Graves*, 1 Wash. 1; *Dutch v. Warren*, 1 Powell on Cont. 137. The contract was as follows, viz.:

“Will you receive my flour on the following terms, viz.: Whenever a load of flour is delivered, should any cooperage be wanting, you charge it to the wagoner and deduct it from the carriage; you will credit me with the highest market price at the time of delivery, and note it on the receipt, and any balance of flour that may remain in your hands unpaid, as it is delivered, you will pay me when I send for it, or deliver as much flour as coming to me, at my option. It is understood, that in case the flour is delivered, storage is to be allowed and charged at sixpence per barrel.

“Agreed: Given under our hands. Alexandria, April 27, 1803. Douglas & Mandeville. John McAllister.”

The plaintiff, on the 14th of October, gave notice to the defendants of his option to receive the flour specifically, but gave time to the defendants till the 19th of November, when the flour not being delivered, the plaintiff, on the 21st November, brought this suit.

Mr. Jones, contra. There was no specific day for the delivery of the flour; when the demand of flour was made, it only showed the plaintiff's option to take flour, and created a duty in Douglas & Mandeville to deliver flour on demand. It was a continuing contract; therefore the damages ought to be the highest price at any time after demand and before verdict. Plaintiff might have sold the flour much higher. Defendants did actually sell much higher.

The COURT being divided (FITZHUGH, J., absent,) the instruction was not given. KILTY, C. J., thought no instruction should be given to the jury. CRANCH, J., was of opinion that the jury should be instructed that they ought to make the price of flour on the day of demand and refusal, and interest thereon, the rule of damages for the non-delivery.

The jury gave damages according to the price on the 19th of

November, which was the day the cause of action accrued, the negotiation for a compromise having on that day failed.

Judgment affirmed by Supreme Court, 3 Cranch, 298.

SLACUM v. JESSE SIMMS, and Peter Wise, Jr., his Surety.

An insolvent, who obtains a warrant of discharge by fraud, is not discharged in due course of law.

DEBT against the principal and surety on a prison-bonds bond; plea, covenants performed; replication, did not keep in the bounds, but departed without being discharged in due course of law; rejoinder, discharged in due course of law; and issue thereon.

Mr. C. Lee, for the defendant, contended that a warrant of discharge by the magistrates is conclusive evidence that Simms was discharged in due course of law, and is as much a discharge of the bond, as it would be to the sheriff, if the prisoner was in actual custody. In an action for an escape, the warrant of discharge would be conclusive evidence. There is no difference between that case and an action on the prison-bonds bond.

Mr. Swann, contra. The issue is, whether Simms was discharged in due course of law. It does not follow that the surety is discharged because the sheriff is discharged. The sheriff is indemnified, because the Act of Assembly expressly makes the warrant an indemnification. The surety is not discharged unless the principal is discharged. But Simms would not be protected against this bond if his discharge was obtained by fraud.

The COURT was of opinion, (FITZHUGH, J., absent,) that the warrant of discharge is not conclusive evidence that Simms was discharged in due course of law.

Mr. Jones, for the defendants, then prayed an instruction to the jury, that if they should be of opinion, from the evidence, that the warrant of discharge was obtained by the fraud of Simms alone, without the participation of the magistrates, or of the defendant, Wise, (the surety,) the warrant was not void so as to enable the plaintiff to recover against the defendant, Wise, in this action. Which instruction the COURT refused to give; but instructed them that such fraud, if proved, would render the warrant void, and therefore the issue could not be supported on the part of the defendants.

Bill of exceptions taken. Verdict for plaintiff, \$1600.

Reversed by the Supreme Court, 3 Cranch, 300.

Ex parte Pasqualt.

ALEXANDER v. HARRIS.

Judgment for double rent.

The avowry is *primâ facie* evidence of the amount of rent distrained for.

REPLEVIN of goods distrained for rent; avowry of rent arrear, concluding with a prayer for judgment for double rent, according to the Act of Assembly.

Mr. Taylor and *Mr. Youngs*, for the landlord, moved for judgment for double rent, under the Statute of Virginia. Old Rev. Code, 165, § 15.

Messrs. E. J. Lee, Swann, and Jones, for the tenants, contended that no instance has occurred in which judgment has been given for double rent. The jury have not found that the whole amount of rent distrained for, namely, \$141.67, was due. The avowry is for \$111.67, and the jury have found \$111.67. It was stated in the plaintiff's replevin-bond that the sum demanded was \$141.67, but the COURT thought the avowry was *primâ facie* evidence of the amount for which the distress was made. The act is peremptory. The Court is bound by the evidence given at the trial, and cannot now, after verdict, go into new evidence. It is not necessary that the avowry should pray judgment for double rent, but if it concludes, "prays judgment for a return, &c.," and for the damages and costs, according to law, it is sufficient to support the judgment for double rent.

Judgment for double rent. FITZHUGH, J., absent.

Ex parte PASQUALT.

A foreign mariner, residing in Alexandria five years, but sailing occasionally during that time in American vessels from that port, may be naturalized.

APPLICATION to be naturalized. Affidavit that he has resided upwards of five years in Alexandria, and that he has during that time sailed from the port of Alexandria, in American vessels, as a mariner. Good moral character, &c.

Admitted.

CIRCUIT COURT OF THE UNITED STATES.

JULY TERM, 1805, AT WASHINGTON.

UNITED STATES *v.* LEFEVRE.

Under the Act of Assembly of Maryland, 1797, c. 110, the offence of keeping a faro-table can only be committed by a tavern-keeper or retailer of spirituous liquors.

INDICTMENT for keeping a faro-table, at common law, and on the Act of Assembly of Maryland, 1797, c. 110.

The COURT was of opinion, that in order to bring the traverser within the Act of Assembly, he must be either a tavern-keeper, or a retailer of spirituous liquors, by being in the custom of selling liquors by retail, either with or without license.

Whereupon *Mr. Jones* gave up the count upon the statute.

UNITED STATES *v.* HENRY FISHER, a free White Man.

A free negro is a competent witness against a free white man. *Quære.*

General reputation of freedom is sufficient to rebut the presumption of slavery arising from color.

INDICTMENT for beating prisoner's wife. The assault having been proved by *Mr. Threlkield*, *Lucy Butler*, a black woman, was offered as a witness on the part of United States; *Mr. Threlkield* having sworn that she had always passed for a free woman for many years, the Court permitted her to be sworn to the jury.

Quære. See the Act of Assembly of Maryland, 1717, c. 13, § 2.

REINHART *v.* ORME & others.

If infants are brought into court, a guardian *ad litem* may be appointed without a commission.

IN CHANCERY. Infants were brought in, and the court appointed a guardian *ad litem*, without issuing a commission.

Decree for a conveyance by consent. *Quære.*

BUCKLEY v. BEATTY'S ADMINISTRATORS.

Administrators are bound to plead before the expiration of a year, from the date of the letters of administration.

RULE to plead.

Mr. Key, for the defendant, objected to pleading, as twelve months had not expired since the death of the intestate. He cannot plead *plene administravit*, because not bound to pay any debts until twelve months after, &c.

Objection overruled. By the law of Maryland, an administrator is not bound to plead *plene administravit*. See the case of *Frazier v. Brackenridge*, [ante, 203.]

UNITED STATES v. ADAM LINDSAY.

The practice of selling spirituous liquors, in a public manner to negroes assembled in considerable numbers, and suffering them to drink the same in or about the house on a Sabbath day, constitutes the offence of keeping a disorderly house.

INDICTMENT for selling spirituous liquor to slaves on Sunday, *contra formam statuti*. The defendant, being a shopkeeper, sold liquors to slaves on Sundays, and kept a disorderly house.

Mr. Jones, for the United States. *Mr. Key*, for the defendant.

The COURT was of opinion, that the indictment does not sufficiently set forth any offence under either of the acts of Maryland, cited 1723, c. 16, § 11, and 1784, c. 7, § 12, and the traverser cannot be convicted thereon, or made liable to the penalties contained therein. But the indictment also states an offence at common law, and although the defendant may not be brought within the statute or statutes against the form of which the indictment concludes, the prosecutor may resort to the offence at common law; and, on this point, the Court was of opinion, that the practice of selling spirituous liquors in a public manner to negroes assembled in considerable numbers, and suffering them to drink the same in or about the house in a Sabbath day, constitutes the offence of keeping a disorderly house. See also the case of *United States v. Coulter*, and *United States v. Prout*, [ante, 203.]

MORRIS v. BARNEY.

The Court will not permit an amendment making new parties.

ASSUMPSIT by indorsees against the maker of a promissory note.

Schnertzel v. Purcell.

Mr. Caldwell, for the plaintiff, moved to amend by adding the name of the payee of the note as plaintiff, for the use of Morris. This was done to avoid the allegation of the defendant that the words *or order* had been inserted by the payee after the note was made.

Refused by the COURT; it being to make new parties.

SEMME\$ v. ONEALE.

After plea of property in the defendant in replevin, the Court will permit the defendant to amend by pleading property in a stranger, on payment of all antecedent costs, and a continuance of the cause.

REPLEVIN. Plea, property in defendant. Leave given to plead property in a stranger, on payment of all antecedent costs, and a continuance, if requested.

SCHNERTZEL v. PURCELL.

If by an amendment, the nature of the action be changed, it is to be considered as a new cause, and may be continued, although at the fifth term after its commencement.

A cause is not regularly for trial, unless it has been put at issue at a preceding term.

THIS was the sixth term since the action was instituted. The plaintiff, at last term, had leave to amend, by changing his action from debt to case, and laid a rule on the defendant to plead by the plea-day.

Mr. Key, for the defendant, now pleads *non assumpsit*, and moves for a continuance, the cause not having been at issue at the last term.

THE COURT. If a cause has not been put to issue at a preceding term, it is not regularly for trial, unless it be the fifth court since its commencement, in which case it must, by Act of Assembly, be disposed of, and cannot be continued. But in this case of a material amendment by the plaintiff, it must be considered as a new cause at the last term, and the issue not being made up, the defendant is entitled to a continuance.

GENERAL RULE.

Officers of the court cannot be bail, unless by permission of the court.

JULY 30, 1805. It is ordered, that no officer of this Court be

Bowie v. Talbot.

admitted as bail, or security, in any cause therein, (except security for costs or fees,) without the special permission of the Court.

POWER v. SEMMES.

Witnesses are entitled to their fees, although the summons be served by a private person. In a judgment upon an attachment, interest cannot be added.

A SUMMONS for witnesses in Virginia, on the part of the plaintiff, was issued and directed to the marshal of Virginia. It was served by a private person who made affidavit that he read it to the witnesses and required their attendance, and that he believed they attended in consequence of such summons.

The COURT allowed them to prove their attendance, and directed their fees to be taxed in the bill of costs, in the same manner as if served by the marshal of Virginia.

On foreign attachment, the interest was calculated up to the time of the affidavit made before the justice who issued the warrant. At the time of condemnation, the plaintiff's counsel, (*Mr. Howitt*,) moved for interest to be added to the time of the judgment. The COURT refused.

WASHINGTON BOWIE v. LEWIS TALBOT.

In taking the deposition of a seafaring man under the Statute of Maryland, 1721, c. 14, § 3, it is not necessary that notice should be given to the adverse party in person. One day's notice to the attorney-at-law is sufficient; but the deposition cannot be read at the trial, unless the court shall be satisfied that the witness has departed from the district.

CASE against a common carrier, for negligence in carrying tobacco from Bladensburg in a scow.

Mr. Caldwell, for the plaintiff, offered the deposition of William Barry, a seafaring man, taken under the Act of Assembly of Maryland, 1721, c. 14.

Mr. Key, for the defendant, objected that the notice was only to himself, as attorney, on the day before the taking, which was not reasonable notice. Every departure from the general rules of evidence, must be taken strictly. The act requires notice to the adverse party. In the Act of 1779, c. 8, the word "attorney" is inserted; so in the Act of Congress, [1 Stat. at Large, 88,] Judiciary act, 1789, § 30.

The COURT overruled the objections, saying that it is not reasonable that the party should have all the benefits of being present

Barney v. Corporation of Washington City.

in court, and not liable to its disadvantages. The benefit of the act might be entirely avoided by the party concealing himself, or the opposite party may not know his residence. But the Court not being satisfied that the witness had departed and was out of the District of Columbia at the time of the trial, rejected the deposition; upon which, a juror was withdrawn by consent, and the cause continued.

JOHN H. BARNEY v. CORPORATION OF WASHINGTON CITY.

A warrant to recover the penalty of a by-law, must name the plaintiffs by their corporate name, and must describe the offence with reasonable certainty. The mayor of Washington cannot exercise jurisdiction in a case in which he is a party.

APPEAL from a justice of the peace on a judgment for a penalty for running a hack, not licensed.

Messrs. Key and Morsell for the appellant, contended, 1st. That the warrant to take Barney to answer to the "corporation," (not calling them by their corporate name,) is void. 2d. That the warrant ought to have stated that Barney was a person residing within the jurisdiction of the corporation.

Mr. Hewitt, for the appellee, relied on the seventh section of the Act of Congress of May 3, 1802, [2 Stat. at Large, 195,] (Charter of Washington,) and on the appearance of Barney, without objecting to the jurisdiction, or to the misnomer of the plaintiff. The warrant was in these words:

"District of Columbia, Washington County, to wit:—"You are commanded to take John H. Barney before me, or some other justice of the peace for said county, to answer unto the corporation for running a hack without license, and hereof make return on the 13th day of July. Given under my hand and seal, this 9th day July, 1805. Thomas Peter. [L. s.] To any constable in said county."

Indorsed, "July 13th, 1805. Judgment is given in favor of the corporation for \$20, and costs 33 cents. Robert Brent. Issue an execution on the above. Robert Brent. The Clerk of Washington county."

The judgment was reversed with costs, because the words "the corporation" are too uncertain; because the defendant is not stated to be the owner of a hack; because the offence is too generally laid; because the judgment is for a double penalty; because the day of the return is not certain, and because judgment was rendered by the mayor of the city of Washington, in a case in which he is a party.

SAMUEL BAKER v. THOMAS HERTY.

Although there be an agreement that the value of extra work should be ascertained by persons mutually chosen, yet if such valuation has not been actually made, the plaintiff, in an action upon a *quantum meruit*, may give other evidence of the value of the work.

Indebitatus assumpsit and *quantum meruit*, for work and labor done as extra work; a special contract under seal having been made for building a house of a certain plan and description, which contained the following clause: "And it is mutually agreed upon that in case any misunderstanding shall take place in relation to the bill of particulars or any other misconception or want of appropriate words to convey the true intent and meaning of said parties, or in case any material alteration shall take place therein, so as to incur an extra expense to the contractor than that hereby contemplated, then and in either of said cases, a competent judge in the premises shall be chosen by each party, whose decision or extra valuation shall be conclusive and binding; and nothing herein contained shall be so construed as to enable either of the said parties to throw up or vary from this contract, and take another mode of valuation, either by the common mode of measure and value, or otherwise, instead thereof, but that such addition or reduction as shall or may be made in said work only, and valued as aforesaid, shall be binding on said respective parties."

Mr. Key, for the plaintiff, offered evidence of the value of digging an area, not contained in the original plan.

Mr. Hewitt, for the defendant, objected, and relied upon the above clause, as an agreement for another mode of ascertaining the value.

The COURT overruled the objection and admitted the testimony.

Mr. Key offered evidence of a third story extra, and of other alterations made in the plan in the two lower stories.

Mr. Hewitt, having offered the agreement in evidence, objected to all the evidence given by the plaintiff, of extra work, alleging that it was provided for by the aforesaid clause in the agreement, and prayed the Court to instruct the jury that they ought not to regard such evidence, it not being legal.

The COURT refused. KILTY, C. J., doubting as to the evidence respecting alterations in the two first stories, the original agreement being for a two-story house.

CRANCH, J. The whole extra work, whether it consist in alterations or additions to the original plan, or bill of particulars is within the covenant; but as no persons have been chosen to ascertain the value of the extra work under that covenant, the

plaintiff is not deprived of his original cause of action on a *quantum meruit*, and can only resort to the covenant for damages against the defendant for not appointing a person on his part to ascertain the value of the extra work. The defendant, in not paying for such work, has not committed any breach of that covenant.

HOPKINS v. SIMMONS.

The opinion of a witness (who has seen the party sign a paper) that another paper is also in the handwriting of the same party is competent evidence, although his opinion is the result of comparison.

ASSUMPSIT. The defendant offered in evidence an account, said to be in the plaintiff's handwriting; and Robert Ellis, a witness, testified that he saw the plaintiff sign a certain receipt; and that, by comparing the account with the signature to the receipt, he believed the account to be in the plaintiff's handwriting.

Mr. Key objected, on the authority of Peake's Law of Evidence, p. 69, that comparison of hands is no evidence in any case.

But the Court admitted the evidence.

DAVIDSON v. BROWN.

In an action upon a bond conditioned to pay money by instalments, if the verdict be rendered before all the instalments are due, the jury must find how much is due upon each instalment and when payable, as well those to become payable as those already payable.

DEBT, on bond, conditioned to pay \$460, on 1st January, 1804; \$460, on 1st January, 1805; \$460, on 1st January, 1806; and \$460, on 1st January, 1807. The writ issued in June, 1804. The trial was in August, 1805. Plea, payment, and issue. (See the Act of Assembly of Maryland, 1785, c. 80, § 13.)

Mr. Morsell, for the plaintiff.

Mr. Key, for the defendant.

The Court directed the jury that if no payment was proved they ought to find the issue for the plaintiff, and also find what amount of principal and interest is now due and payable, and what further sum will become payable, and when.

The judgment was entered as follows: Judgment on the verdict, for the penalty and costs, to be released on the payment of \$1187.32, with interest thereon from this date till paid. And on the payment of \$520.80, with interest thereon from the 1st day

Boyer v. Herty.

of January, 1806, till paid, with liberty to take out execution therefor after that day. And on the payment of \$476, with interest thereon from the 1st day of January, 1807, till paid, with liberty to take out execution therefor after that day.

VOSS v. HOWARD.

In an action of assault and battery, for beating the plaintiff's servant *per quod*, &c. The plaintiff cannot recover without evidence of loss of service.

ASSAULT AND BATTERY on plaintiff's servant, *per quod*, &c.

Verdict for the plaintiff, one cent damages, subject to the opinion of the Court, on the following statement of facts, viz.: Joseph Cole, a mulatto slave, the property of a citizen of Maryland, hired himself, with his owner's permission, in the city of Washington, to Nicholas Voss, by the month; the said negro received the wages for his labor, and lived, not with Mr. Voss, but with his own wife, a free white woman, and came daily to his labor; that an affray and fight took place between the defendant and said Cole; that the defendant struck and beat the said Cole, but not so as to occasion any loss of labor to the said Voss. The declaration was a common count, in assault and battery, *per quod servitium amisit*.

The opinion of the COURT was for the defendant. The loss of service is the gist of the action, and the statement admits that there was no loss of labor, which the Court considered as synonymous with service.

Judgment for the defendant.

BOYER v. HERTY, Special Bail of Owen Roberts.

A surrender of the principal will not be received after the return term of the *scire facias* against the bail, nor will the proceedings be stayed upon producing a discharge of the principal under an insolvent law, at the third term after the return of the *scire facias*.

MOTION to stay proceedings against bail, or to enter an *exoneretur*. The *ca. sa.* against Roberts was returned "*non est*," to December term, 1803. On the 7th of January, 1804, the law of Maryland was passed to discharge Roberts as an insolvent debtor. On the 27th January, 1804, the *scire facias* issued against the bail, returnable to July term, 1804, and was returned *scire feci*.

In May, 1804, Roberts was discharged by the Chancellor of Maryland.

Mr. Jones, for the defendant. The motion to the Court is in lieu of an *audita querela*, and the Court will decide upon equitable principles, and enter an *exoneretur, nunc pro tunc*. *Humphrey v. Leite*, 4 Burr. 2107. In *Dodson v. King*, Carth. 515, in debt against bail, upon their recognizance, they were relieved by having surrendered the principal, after *non est* returned on a *ca. sa.* against him, and before the return of the *latitat* upon which they were arrested. Bail has a right to bring in the principal on the return of the first *scire facias* executed or the second returned *nihil*; and although it is *ex gratiâ*, yet it has become a rule, and a right. If the principal be released under the bankrupt law of England, before the bail is fixed, an *exoneretur* will be entered. Cowp. 823; 1 T. R. 624. Bail cannot plead discharge of the principal, to a *scire facias*, but may show it on motion, in lieu of a surrender of the body. But the death of the principal, after return of *ca. sa.* against him will not discharge the bail. *Parry v. Berry*, Lord Raym. 1452. In the case of *Woolley v. Cobb*, 1 Burr. 244, the final discharge was not obtained until execution against the bail. So in the case of *Walker v. Giblett*, 2 W. Bl. 811. In *Donnelly v. Dunn*, 1 B. & P. 448, and 2 B. & P. 47, the bail had no right to surrender, when the discharge was obtained, which differs that case from the present. The application is to the equity of the Court, and is the customary mode adopted in lieu of bringing in the principal. *Martin v. O'Hara*, Cowp. 823.

The Court will only exonerate where the bail have a right to discharge themselves by surrender. *Southcote v. Braithwaite*, 1 T. R. 624. But here the principal was discharged and the bail had a right to surrender him at the return of the *scire facias*.

The Court stopped *Mr. Key*, *contrâ*, and said that although the practice has made it law, yet it is still *ex gratia*, for the rule is well established that if the principal die after *ca. sa.* returned *non est* and before *scire facias* against the bail, yet the bail is fixed. Here the bail was fixed, and although he might surrender the principal at the first term upon the return of the *scire facias*, (and perhaps at that term the Court might have entered an *exoneretur* while it was in the power of the bail to surrender,) yet the bail having neither surrendered the principal nor produced his certificate of discharge at that term, the application is now too late, this being the third term after the return of the *scire facias*.

The motion was overruled.

CIRCUIT COURT OF THE UNITED STATES.

SEPTEMBER, 1805, ADJOURNED TERM, AT WASHINGTON.

Mr. Mason's causes, which were *non prossed* at the former session of this term, were reinstated upon his stating that he was confined to his bed by sickness in the country, and unable to attend and to write.

BURFORD *v.* RINGGOLD & MORSELL.

The Court, at an adjourned session, will not hear a motion to dissolve an injunction upon notice given after the first session of the term.

INJUNCTION. The answers of the defendants were filed August 10, 1805, and notice of motion to dissolve on the 30th of September, 1805, (the day to which the July term stood adjourned) was served on Burford on the 18th of August, and on *Mr. Youngs*, his solicitor, on the 21st September, who acknowledged service and promised to attend on this day (October 4, 1805.)

The COURT refused to hear the motion to dissolve at this time. (See the decision of the Court in Alexandria, in the case of *Wright v. West's Executrix*, [*post*] where the Court refused, at the adjourned Court in March, to take up cases which were set for decree or dissolution, subsequent to the original term of November, 1803.)

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1805, AT ALEXANDRIA.

TUCKER v. MARSTELLER, Garnishee of Stonemeitz.

An acceptance, by the garnishee, of the defendant's draft in favor of a third person before service of the attachment, binds the garnishee, and cannot be overreached by the attachment.

THE garnishee answers on oath that Stonemeitz told him he should send goods to his vendue to be sold, for which the garnishee should settle with Stonemeitz's wife. The goods were sent and sold, and Stonemeitz's wife on the same day drew two orders, one in favor of Myers, or order, for sixty-one dollars, and one in favor of _____ or order, for forty-six dollars, which the garnishee accepted to pay, if the proceeds of the sale should amount to so much. On the next day the attachment of the plaintiff was served.

THE COURT decided that the acceptance of the orders bound the garnishee, and that the attachment should not overreach the acceptances.

SUMMERS v. WATSON.

Covenant will not lie on the condition of an injunction bond.

COVENANT, on the condition of an injunction bond against the defendant as surety.

Motion by *Mr. Taylor*, for the defendant, to appear without bail, on the ground that bail could not have been required if the plaintiff had brought an action of debt on the bond; and that covenant will not lie on the condition of a bond. The defendant does not covenant or promise to perform the condition, but may pay the penalty if he chooses. By the Act of Assembly, the plaintiff has a right to hold to bail in an action of covenant if he has a right of action of covenant. But here he has no right of action of covenant.

THE COURT were of opinion that covenant will not lie on the condition of this bond.

UNITED STATES v. ANDREW SCHOLFIELD.

A master cannot bring his apprentice from Maryland and hold him in Alexandria.

INDICTMENT for false imprisonment of James Carter, a mulatto boy.

Mr. Swann, for the defendant, moved the Court to instruct the jury, that the evidence does not support the indictment. The evidence was that the boy (who was a free mulatto) was bound to the defendant, in Maryland. The defendant brought him into Alexandria. By the law of Maryland the indenture was void if he carried him out of that State. The defendant having brought him to Alexandria, sold his time to Hodgkins.

The COURT refused to give the instruction.

Mr. Swann then moved the Court to instruct them that the indictment could not be supported without proof of a sale by defendant to Hodgkins, that being charged in the indictment.

Refused, the offence of false imprisonment being sufficiently charged, and the sale only matter of aggravation.

WILSON v. WILSON'S ADMINISTRATORS.

An administrator has a right at law to give a preference to a creditor by confessing a judgment, and a court of equity will not interfere by injunction.

BILL for injunction to prevent the administrators from confessing judgment at law in favor of other creditors in equal degree; and to distribute the assets *pari passu*.

Mr. C. Lee, for the complainant. An administrator is a trustee, and subject to equitable jurisdiction. At law an administrator may prefer a creditor in equal degree; but a court of equity may interfere; especially before any payments are made.

The equity of him who claims *pro rata* is superior to that of him who contends for all. *Kelly v. Collins*, 1 Fowler's Exchequer Practice, 298; *Maxims in Eq.* 15, 17; 2 Ch. Ca. 228; *Gibson v. Kinven*, 1 Vern. 66; *Salley v. Gower*, 2 Vern. 62; *Waring v. Danvers*, 1 P. Wms. 296; *Joseph v. Mott*, Prec. in Ch. 79; *Smilh v. Haytwell*, Amb. 66; *Brooks v. Reynolds*, 1 Bro. Ch. Rep. 183; *Hardcastle v. Chettle*, 4 Id. 163; *Lowthian v. Hasel*, 4 Bro. C. C. 167.

Mr. Simms, for the defendants. This attempt is novel. There is no precedent for it as to legal assets. It goes to prevent the creditors from proceeding at law to recover judgment. The ad-

ministrators cannot defend themselves. If they are trustees, they are created by law and must proceed according to law. Why not extend the principle to the dignity of the debt? A Court of Chancery has as good a right to interfere in that case as in this. A creditor ought not to be prevented from gaining a priority at law by his diligence. Preference is not fraud *per se*. If it was, all preferences would be void at law as well as in equity. In equal equity the law must prevail. Max. in Eq. 62. There is a difference between the court's power over trusts created by the parties and those created by law. Equity will not interfere, unless there is some circumstance which brings the legal assets under its jurisdiction. The mere deficiency is not a ground of equity. Equity will not prevent the creditor from the legal remedy which he had at the death of the intestate. Went. Off. of Ex'rs, 145. Preference is not covin. *Goodfellow v. Burchett*, 2 Vern. 299; *Waring v. Danvers*, 1 P. Wms. 295; *Ld. Orford's case*, Pr. in Ch. 188; *Morrice v. Bank of England*, Ca. Temp. Talbot, 220; *Martin v. Martin*, 1 Ves. 211.

Mr. E. J. Lee, for the complainant, cited *Brown v. Allen*, 1 Vern. 31; *Brathwaite v. Brathwaite*, 1 Vern. 335; *Wall v. Thurbane*, 1 Vern. 414; *Buckle v. Alleo*, 2 Vern. 37; *Surry v. Smalley*, 1 Vern. 457; *Silk v. Prime*, 1 Bro. C. C. 138; *Girling v. Lee*, 1 Vern. 63; *Greaves v. Powell*, 2 Vern. 248; *Cutterback v. Smith*, Prec. in Ch. 127; *Bickham v. Freeman*, Id. 136; *Harding v. Edge*, 1 Vern. 143; *Cooper's Bank. Law*, 29, *Addenda*; Vin. Ab., tit. Executors, D.; 3 P. Wms. 222.

KILTY, C. J., delivered the opinion of the Court. The injunction in this case, is applied for on the ground that equity requires that the creditors of an insolvent should equally share his effects. It is an application to dispense with a rule of law, because that rule is inequitable in itself, and not because this particular case has any peculiar circumstances which take it out of the general rule. That a law is in itself inequitable in every possible case, or in its general application, will not justify the Court in dispensing with it. This would be to usurp legislative power. Where it is necessary for a person to apply to a court of equity to obtain a remedy which he could not have at law, the court will compel him to do equity before they will grant him the relief he asks. Upon this principle, it is, that when a creditor claims equitable assets, they will allow him only an equal share with those who have equal equity. But where a creditor gains a legal advantage, the court will not restrain him, unless for the purpose of carrying into effect its own decree—its own decree already passed, not that which it may hereafter make.

The same law which gives a priority to creditors of a particu-

lar class, (for instance, bond-creditors,) makes it necessary, in case of a deficiency of assets, that a priority should exist between creditors in equal degree; otherwise the administrator would not be able to protect himself against them all, by paying some, and pleading *plene administravit* as to the residue. Priority of payment follows priority of judgment; and even if an administrator could not confess a judgment, there would still exist a priority, because the judgments could not be rendered at the same moment. Some creditors would gain a priority by diligence, and others by the greater ease in establishing their claims. It is, therefore, clear, that there is, at law, a priority, or at least the legal means of obtaining a priority, among claims in equal degree, as well as among claims of different degrees. The principle upon which the injunction is claimed, applies as strongly to reduce to a level claims of different degrees, as claims of the same degree. The rule of law is as strong in favor of the one priority as of the other.

The question then recurs, whether this Court can set up the general inequitable nature of the law, as (in itself) a ground of equitable relief? We are clear that it cannot. That it would be an usurpation of legislative, and not an exercise of judicial powers. The injunction, therefore, cannot be granted.

JOHNSTON v. HARRIS.

A joint bill of parcels, is not conclusive evidence of a joint sale. The Court will not permit a point of law which the Court has decided, to be argued to the jury.

A new trial will not be granted, because the verdict is against the weight of evidence, if substantial justice has been done.

ASSUMPSIT for goods sold and delivered. Upon the trial of the general issue, the defendant offered in evidence a bill of parcels of the same goods rendered by and in the handwriting of the plaintiff, beginning with these words: "Mr. Theophilus Harris, bought of Dunlap and Johnston," and containing a particular account of rum and sugar; at the foot of which, was the following receipt, signed by the plaintiff: "Received Messrs. Clingman & Magaw's note for the above sum, payable to the order of John Towers and Theophilus Harris, payable the 2d of April, 1798; when paid, received in full."

This note, with the blank indorsements of Towers and Harris and Johnston, was delivered by Johnston to Dunlap, who brought suit upon it in Virginia, against Harris, but failed to recover, because an indorsee cannot, in Virginia, recover at law against a remote indorser. Dunlap then brought suit against Towers, on the same note in this Court, which suit was still pending.

The defendant, upon these facts, prayed the Court to instruct the jury, that the plaintiff could not recover in this action for the goods sold; and that from the bill of parcels and receipt aforesaid, the transaction must be considered as a joint contract. Which instruction, the Court refused to give, as prayed, but directed the jury that the bill of parcels was evidence (but not conclusive) of a joint contract of sale; and that the plaintiff may explain the transaction by parol, or other evidence to prove that he was the sole owner of the sugar, and that Dunlap was the sole owner of the rum, and that the contract was made with the plaintiff in his own right for the sugar, and with him as agent of Dunlap for the rum. But if the plaintiff should produce no explanatory evidence, he could not maintain the present action. And the Court further instructed the jury that if they should be satisfied, by the evidence, that the contract of sale was made with the plaintiff alone, and that part of the goods was the sole property of the plaintiff, and that the residue was the sole property of Dunlap, and that the plaintiff had authority from Dunlap to sell such residue; then the plaintiff had a right to recover judgment in this action against the defendant for the whole amount of the goods so sold and delivered, and that the other facts stated are not sufficient to bar the plaintiff.

Mr. Swann, for the plaintiff, was then going on to argue to the jury from the face of the bill of parcels, that it did not purport a joint contract; but the Court stopped him, and would not suffer him to argue the question of law to the jury after it had been decided by the Court.

Verdict for the plaintiff.

Mr. Jones, and *Mr. C. Lee*, for the defendant, moved for a new trial. 1. Because the verdict was against evidence. 2. Because the plaintiff's brother in law was on the jury. 3. Because the note was outstanding, and had been passed away by Johnston, who had received its value from Dunlap. *Thearslake v. Morgan*, 5 T. R. 513; *Tapley v. Martens*, 8 T. R. 453.

CRANCH, J., delivered the opinion of the Court. This was an action of assumpsit, for goods sold and delivered by the plaintiff to the defendant. The plaintiff proved the sale and delivery of the goods, and that defendant gave the note of Clingman & Magaw, indorsed by Towers and the defendant for the amount of the goods, payable in five months. Dunlap, to whom Johnston had indorsed the note, brought suit in Virginia against the present defendant as indorser, and failed to support his action on the note, upon the ground that an indorsee in Virginia has not a remedy upon the note against a remote indorser. The defendant then produced a bill of parcels, made out in the name of Dunlap and

Johnston, with a receipt given by Johnston alone for the note of Clingman & Magaw, which, when paid, was to be in full satisfaction for the goods sold. The defendant contended that this was evidence of a joint sale, and that the promise was made to Dunlap and Johnston jointly, and therefore the form of the action had been mistaken. The Court instructed the jury, that the bill of parcels was evidence, but not conclusive evidence of a joint sale, and that the plaintiff might produce parol or other evidence, to show that part of the goods sold was the separate property of Johnston, and that Johnston had authority from Dunlap to sell his part; and that if the jury were satisfied by the evidence that this was the real transaction, the plaintiff had a right to recover the whole amount of the goods. The plaintiff produced evidence to show that no general partnership existed between Dunlap and Johnston. That Dunlap never claimed any ownership of the sugar, and that Johnston never claimed any ownership of the rum; and that Dunlap did not deny the right of Johnston to sell the rum.

Upon this evidence and instruction of the Court, the jury found a verdict for the plaintiff, for the whole claim, and the defendant has moved for a new trial, on the ground that the verdict is contrary to evidence. It is the office of the Court to decide what is evidence. But it is the province of the jury to ascertain its weight. Some evidence was offered to the jury, from which they had a right to infer a separate property in the goods, and an authority from Dunlap to Johnston to sell Dunlap's part. It was for the jury to judge of its effect, upon a consideration of all the circumstances which were proved. They have drawn the inference, and the Court cannot say it has been drawn improperly.

On a motion for a new trial, grounded on a defect of evidence, the Court will consider the justice and equity of the case, and if they find these to be in favor of the verdict, and if there was any evidence which could reasonably justify the inference which the jury has drawn, they will support the verdict. The objection which the defendant made, and which was grounded on the bill of parcels; did not go to the substantial merits of the case. It did not show that the defendant had discharged the debt; while it contained, in itself, the evidence that he had received the goods. The plaintiff has parted with his property; the defendant has received it, and has not paid for it. The note, unless it produced the money, was no payment. It has not produced the money, and no negligence is imputed to plaintiff. The justice and equity of the case, therefore, are on the side of the verdict; and the COURT thinks that the jury had reasonable ground to presume the facts necessary to support it. In refusing to grant the new trial,

however, the Court will annex a condition that the plaintiff shall produce and deliver to the defendant the note of Clingman & Magaw, mentioned in the receipt upon the bill of parcels, and that Mr. Dunlap shall give the defendant a release of all demands on account of the rum, for the price of which this action is brought. Upon these terms the Court will refuse to grant a new trial.

Reversed by the Supreme Court U. S. (3 Cranch, 311,) because the note was outstanding when the instruction was given.

KNOX & CRAWFORD v. SUMMERS & THOMAS.

After office judgment against two defendants, set aside by a general appearance by attorney for both, and the cause sent back to the rules, one of the defendants may plead in abatement that he is a deputy-marshal, and that the *capias* was not served upon him by a disinterested person, and such plea will abate the writ as to both defendants.

DEBT against Summers and Crawford. Both defendants were taken by the marshal, and after office judgment, appeared by attorney and set aside the office judgment; whereupon the cause was sent back to the rules for further proceedings, when the defendant, Summers, in proper person, pleaded in abatement that he was one of the marshal's deputies, and that the *capias* was not served on him by a disinterested person, as required by the 28th section of the Judiciary Act of 1789. [1 Stat. at Large, 87.]

Special demurrer. 1. Because the plea was filed long after the defendant's appearance by attorney. 2. Because, after the defendant's appearance, no objection can be urged to the irregularity of service of the process. 3. Because, if the process was irregularly issued, directed or served, the remedy is by motion, and not by plea; and, 4. Because the process was duly issued, directed, and served. By the 28th section of the Act of 1789, [1 Stat. at Large, 87,] it is enacted, "that in all causes wherein the marshal or his deputy shall be a party, the writs and precepts therein shall be directed to such disinterested person, as the court, or any justice or judge thereof, may appoint; and the person so appointed is hereby authorized to execute and return the same."

Mr. Swann, for the plaintiffs, contended that when the deputy-marshal was the defendant, it was optional with the plaintiff to apply, or not, to the court, or a judge, to appoint another person than the marshal to serve the *capias*. The provision was made for the benefit of the opposite party, and not for that of the deputy-

marshal, and that, where a deputy-marshal is a joint defendant, it can be no valid objection that the writ was served by the marshal. That the only object of process is to compel an appearance, and that when the defendant has appeared it is immaterial by what process he was compelled. There is no precedent of a plea in abatement for irregularity of process. Bac. Ab., tit. Error; *Moore v. Watts*, *Ld. Raym.* 616, 617; *Walgrave v. Taylor*, *Ld. Raym.* 706; *Cameron v. Lightfoot*, 2 Bl. Rep. 1190.

Mr. Jones and *Mr. C. Lee*, for the defendants. This is not an objection apparent on the face of the writ. It is a matter which can only be disclosed by plea. The Act of Congress is peremptory. There is no time limited for pleading in abatement.

The COURT decided that the plea in abatement was good.

Demurrer overruled.

Judgment reversed in the Supreme Court of the United States, 3 Cranch, 496; that court being of opinion that the appearance of the defendants by attorney cured all irregularity of process.

GOVERNOR OF VIRGINIA, Use of Bedinger, v. C. TURNER'S SURETIES.

An order payable out of a particular fund, and not negotiable, is not payment of a preceding debt.

DEBT on official bond as town-sergeant; breach, non-payment of fees put into his hands to collect for Bedinger; general replication and issue.

A copy of a list of fees, dated 5 May, 1800, with Turner's acknowledgment, was produced. At the bottom of the list was the following order:

"Sir:—Pay Mr. Russel, out of the sale of negroes, fifty dollars, and return Groverman's note. Charles Turner. 26th December, 1801. Wm. Turner."

Mr. Youngs, for the defendant, prayed the Court to instruct the jury, that if they should be of opinion, from the evidence, that Russel was the authorized agent of Bedinger, and that William Turner was the deputy-sergeant under Charles Turner, and that the order had remained in the hands of Russel, from its date to this day, then the order was a payment, unless the plaintiff can show that he has used due diligence to get the money from William Turner, and failed.

The COURT refused to give the instruction, because it was not a bill of exchange, and being payable out of a particular fund, was not negotiable; and there is no evidence of the terms or

Wise v. Withers.

conditions on which it was received by Russel, nor that it was agreed to be received by Russel on any terms; and it being merely an order by the principal on his deputy, is no more than an order on himself.

BANK OF ALEXANDRIA v. THOMAS DAVIS.

The Bank of Alexandria is, by its charter,¹ entitled to judgment at the first term.

WRIT returnable to this term.

The COURT, some days ago, appointed yesterday for the trial of this cause under the law incorporating the bank.

Mr. C. Lee hoped that judgment would not be rendered by default until a rule had been laid, or notice given to defendant. The appearance-day is the day after the rising of this Court.

The defendant being called, and not appearing, judgment by default was rendered and a writ of inquiry awarded.

WISE v. WITHERS.

A justice of the peace in the District of Columbia, is not an officer, judicial or executive, of the government of the United States, and is liable to do militia duty.

TRESPASS for distraining goods for a militia fine; special justification under a warrant, &c.; replication, that the plaintiff was a justice of the peace; demurrer and joinder.

The Act of 3d of March, 1803, [2 Stat. at Large, 215,] to provide for the organization of militia of the District of Columbia, excepts from enrolment all those who are exempted from military duty by the laws of the United States; and the Act of the 8th of May, 1792, [1 Stat. at Large, 272,] exempts from military duty "the officers, judicial and executive, of the government of the United States."

The COURT (CRANCH, J., *contrà*,) decided that the defendant, who was a justice of the peace in the District of Columbia, was not an officer, judicial or executive, of the government of the United States.

This judgment was reversed by the Supreme Court (3 Cranch, 331.)

¹ The charter has since been altered in that respect.

Lee v. Lacey.

LADD v. PATTEN.

Upon a plea of tender, it is not sufficient to prove that the defendant asked the plaintiff if he would take the money, and said he was ready to pay it, and would give his check for it.

THE COURT permitted the defendant to file the plea of tender as to the *quantum valebant*; general replication and issue.

The evidence of the tender was, that the defendant asked the plaintiff if he would take the money, and said he was ready to pay it, and would give a check for it. The plaintiff refused.

The COURT instructed the jury that the defendant must prove that he produced and offered the money to the plaintiff.



E. J. LEE v. BENJAMIN LACEY.

In an action upon the case against the master of a vessel, for carrying, or attempting to carry away the plaintiff's slave, contrary to the Act of Virginia of 25th of January, 1798, § 6 and 7, the defendant is not liable unless he knew that the slave was on board.

THIS was an action upon the case upon the Statute of Virginia of 25 January, 1798, § 6 and 7, by the owner of a slave, against the master of a Georgetown packet-boat, for damages for carrying the plaintiff's slave from Alexandria to Georgetown, whereby the plaintiff lost the service of the slave from the 29th of April to the 21st of May, and was put to great expense, &c. There were two counts upon the statute, namely, one for carrying away, and the other for attempting to carry away a negro belonging to the plaintiff. There were also several counts at common law.

The COURT instructed the jury, that if the defendant had no knowledge of the negro coming on board, nor of his being on board his boat, nor of his going out of his boat in Georgetown, the defendant was not liable; but that if the defendant saw the negro during the passage, or knew of his being on board his boat, and suffered him to land and go at large in Georgetown, he was liable in this action for damages if the plaintiff can prove that he sustained any thereby.

Verdict for the plaintiff, 120 dollars.

Mr. Jones and Mr. C. Lee, for the plaintiff.

Mr. Swann, for the defendant.

WELLFORD & Co. v. EAKIN.

If the subscribing witness to a note be not within reach of the process of the Court, it is not necessary to produce him or to prove his handwriting; but the defendant's handwriting may be proved.

DEBT on note. Mr. Vasse was a subscribing witness. The plaintiff gave evidence that Vasse had been summoned at the last term from Staunton, in Virginia, but had heard he had gone to Tennessee. The witness never resided within the reach of the process of this Court. (See *Smith v. Carolin*, [ante, 99]; *Jones v. Lovell*, [ante, 183]; *Waterston v. Cook*, (not reported); *Maccubbin v. Lovell*, [ante, 184].)

The COURT said that where the subscribing witness resides out of the reach of the process of this Court, it is not necessary to produce him nor to prove his handwriting; but the plaintiff may produce evidence of the writing of the defendant.

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 NEGRO LOUDON v. CHARLES SCOTT, JR.

A slave brought into Alexandria in 1802, by a person removing from Maryland, and omitting to take the oath within sixty days after his removal, is entitled to freedom under the Act of the 17th of December, 1792, although the person bringing the slave was not his owner.

THIS was a suit for freedom, under the Virginia act of 17th December, 1792. Charles Scott, senior, the defendant's father, came to live in Alexandria, in March, 1802, from Maryland, and brought with him the plaintiff, who has remained here ever since he first came, and was hired out by the defendant's father, who received his wages. In June, 1803, the defendant, Charles Scott, Jr. (the owner of the plaintiff,) came also to reside in Alexandria, from Maryland; and on the 5th of July, 1803, took the oath required by the statute to be taken by the owner of the slave.

Mr. Jones, for the defendant, contended that the negro is not free unless brought in by authority of his owner. It has been decided by the case of *McDaniels's* negroes, that where the master does no act which subjects him to the penalty, the negro is not entitled to his freedom.

The COURT instructed the jury, that if they should be satisfied, by the evidence, that the plaintiff was brought from Maryland, into the county of Alexandria, in the year 1802, by the defendant's father, who exercised acts of ownership over him, and hired him out as his slave, and that the plaintiff has been kept in the

said county, for one whole year thereafter, or so long at different times as amount to one year, before the bringing of this action, then the plaintiff is entitled to his freedom, although the jury should be satisfied that he was the property of the defendant, at the time he was so brought in, and that the defendant took the oath on the 5th of July, as stated in the certificate.

Verdict for plaintiff. Reversed by the Supreme Court of U. S. 3 Cranch, 324.

COURTNEY v. HUNTER'S ADMINISTRATOR.

A defendant, who obtained letters of administration in Fairfax county, before the District of Columbia was separated from it, cannot, in a suit in the district, after its separation, sustain the plea of never administrator.

An implied promise is only coextensive with the consideration. An implied promise, in consideration of assets alone, is a promise as administrator.

VERDICT for the plaintiff, subject to the opinion of the Court upon the following questions:—1. Whether the defendant, who obtained letters of administration in Fairfax county, before its separation from Virginia, can maintain the plea of “never administrator.” 2. Whether it was necessary, under the Statute of Frauds, that the promise alleged in the 2d count should be in writing. The 1st count was upon the promise of the intestate. The 2d count was that in consideration that the intestate was indebted to the plaintiff, and that the defendant had assets, the defendant promised to pay, &c.

Mr. E. J. Lee, for the defendant. 1. An administrator in Virginia is not an administrator here, unless he has letters of administration from the Orphan's Court of this county. *Fenwick v. Sears's Administrator*, 1 Cranch, 259. The defendant might have been sued as executor *de son tort*. In Virginia he could not be sued as administrator until administration granted. Estates in Alexandria are to be administered as in Maryland, *pari passu*. If he is bound to pay as administrator, and yet cannot collect the assets, how can he avoid a *devastavit*? How can he ever plead *plene administravit*? How can he maintain a counter suit? The 2d count charges the defendant personally, upon his own promise, and the judgment will be *de bonis propriis*; he cannot be charged upon such a promise to pay out of his own estate, without a note in writing according to the Statute of Frauds. *Rose v. Bowler*, 1 H. Bl. 108; *Secar v. Atkinson*, 1 H. Bl. 102; *Lewis v. Lewis*, 1 H. Bl. 111; *Rann v. Hughes*, 7 T. R. 350 (n); *Hawkes v. Saunders*, Cowp. 289.

Mr. Youngs, for the plaintiff, was stopped by the COURT on the

2d point. As to the 1st point: If an administrator in Virginia goes into Maryland, is he not liable there? He cannot be sued as executor *de son tort*, because he had rightful possession of the assets. If sued as administrator in Maryland, he may plead *plene administravit* according to the laws of Virginia.

The COURT gave judgment for the plaintiff upon both points. The case of *Rann v. Hughes* seems decisive, on the 2d point, that the implied promise can only be coextensive with the consideration. If the consideration be assets merely, the implied promise is a promise as administrator, and the judgment is *de bonis testatoris*. If the consideration be personal the implied promise is personal, and the judgment *de bonis propriis*.

FINLEY v. MCCARTHY.

The administrator of appearance-bail cannot be allowed to appear as appearance-bail and plead for the principal.

THE appearance-bail died before the appearance-day. Motion by *Mr. Youngs*, for the administrator of the appearance-bail to appear as appearance-bail, and not as special bail, and plead for the principal, according to the 26th section of the Act of 12th December, 1792.

Refused by the COURT. There cannot be the same judgment against the administrator of the appearance-bail as against the principal.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1805, AT WASHINGTON.

STOVER *v.* DENSLEY.

Quære, whether a defendant, discharged under the insolvent law, after arrest on a *capias ad respondendum*, and before the return, can be compelled to appear.

ASSUMPSIT. The *capias* was returned "*cepi*—discharged under insolvent law."

Mr. Sprigg, for the plaintiff, objected to the return without an appearance. The COURT thought he could not compel an appearance; but gave him leave to move it again.

THOMPSON *v.* CARENOUGH.

If there be no declaration the Court will not require special bail, unless the plaintiff appears at the return of the writ.

ASSUMPSIT. No declaration filed; but the plaintiff had ordered the writ in person and had filed an account, sworn to. The marshal brought in the defendant. The plaintiff, being called, and not appearing, and having employed no attorney, the COURT did not order the defendant to give bail, nor to be committed; but permitted the defendant's appearance to be taken without bail.

CAUSIN *v.* CHUBB.

If the plaintiff has received the debt and costs the marshal cannot detain the defendant upon a *ca. sa.* for the poundage.

CA. SA. returned *cepi*. The marshal brought in the defendant. The plaintiff admitted he had been paid the full amount of debt and costs. The plaintiff did not call upon the marshal to bring in the body; nor, upon the marshal bringing him in and offering him to the plaintiff, did he pray him in commitment.

United States v. Baker.

The COURT decided that the marshal had no right to hold the defendant upon the *ca. sa.* for the poundage, it being no part of the judgment. See Act. of Maryland, 1779, c. 25, § 4, 5, and 1790, c. 59, § 2.

UNITED STATES v. MICKLE.

The gratuitous distribution of ardent spirits at a public gaming-table does not constitute the keeper of the table a retailer of spirituous liquors, within the meaning of the Act of Assembly of Maryland.

INDICTMENT. 1st count, at common law, for a nuisance, in keeping a public gaming-house. 2d. Under the Act of Assembly of Maryland, for keeping a faro-table, the defendant being a retailer of spirituous liquors.

The COURT said they had decided, in *Ismenard's case*, on the same indictment, that the distribution of spirituous liquors at the gaming-table, without receiving payment specifically therefor, was not a retailing of spirituous liquors within the meaning of the act.

Mr. Jones, for United States, gave up the 2d count.

Verdict guilty on the 1st count.

UNITED STATES v. SAMUEL BAKER.

The officer cannot justify under a *feri facias*, without producing it.

An agent of the plaintiff has a right to enter the house of the defendant with the officer, to show him the defendant's goods to be taken on the *feri facias*; and the authority of the agent need not be in writing, but may be proved by the testimony of the agent himself.

THIS was an indictment against Baker for an assault and battery upon W. Howard, who entered Baker's house with the officer who had an execution against the goods of Baker, at the suit of Barry. Howard accompanied the officer at the request of the plaintiff, and as his agent to show the goods to the officer.

The COURT decided that Howard was a competent witness to prove his own authority as agent of the plaintiff; that it was not necessary that the authority should have been given in writing, and that he had a right to enter the house with the officer, and to remain in the house long enough to show the property, and for the officer to take an inventory. Verdict guilty; fined ten dollars.

UNITED STATES v. FRANK TOLSON.

The owner of stolen goods is a competent witness, after releasing to the United States his share of any fine which the Court may impose upon the prisoner.

If goods be stolen in Maryland, and brought by the thief into this district, he may be convicted and punished here.

THE prisoner was indicted, under the Act of Congress of 1790, [1 Stat. at Large, 112,] for the punishment of certain crimes, for stealing a watch in the county of Washington. The evidence was that he stole the watch in Maryland, and brought it into this county.

Mr. Caldwell, for the prisoner, contended, that as the offence was committed under another sovereignty, the English cases respecting goods stolen in one county and carried into another county, did not apply; for both counties in England are under the same jurisdiction, and governed by the same laws. But here the jurisdiction and laws are entirely distinct. The offence must be complete, within our jurisdiction, or it is no offence. But the offence was complete in Maryland, and if he should be convicted and punished here, it would be no bar to a conviction there.

THE COURT, however, overruled the objection, (KILTY, C. J., absent,) and the prisoner was convicted and punished by fine and whipping. Upon the trial, the owner of the watch having released to the United States his share of any fine which the Court might impose, was examined as a witness in chief. See 1 Hawk. c. 33, § 9; 2 Hawk. 221; 7 Co. 2 (a.); 2 Hale, P. C. 163; 2 Hawk. 220; Doug. 796; 2 Hawk. 247, § 47; 1 Hawk. 136; and the case of *The Commonwealth v. Cullins*, 1 Mass. Rep. 116. See *U. S. v. Clancy*, [ante, 13]; *U. S. v. Hare*, [ante, 82]; *U. S. v. McCan and Dulany*, [ante, 207]; *U. S. v. Brown*, [ante, 210.]

THORNTON & WHITE, Commissioners of the City of Washington,
v. WILLIAM O'NEALE.

Under the Act of Maryland of 1793, c. 58, § 2, the commissioners of the city of Washington had a right to resell the public lots as often as a purchaser should fail to pay for them, and charge each preceding purchaser with the loss upon the resale.

ASSUMPSIT, against the maker of a promissory note, indorsed by Basil Wood, as surety, and given to the plaintiffs to secure the purchase-money of lots No. 1 and 2, in the square No. 107, in the city of Washington, dated August 6, 1800. The lots had been purchased of the commissioners by Morris & Greenleaf on the 24th of December, 1793, among many others, amounting in

the whole to 6000 lots; but having failed to pay the whole of the purchase-money, these two lots were sold again by the commissioners, under the Act of Assembly of Maryland, 1793, c. 58, § 2, for the default of Morris & Greenleaf. The defendant became the purchaser at the price of 216 dollars, and gave his note therefor on the 6th of August, 1800; the amount then due from Morris & Greenleaf for those two lots being 71 dollars and twenty-four cents. The Act of Maryland, 1793, c. 58, § 2, under which this sale was made, is in these words: "That on sales of lots, in the said city, by the said commissioners, or any two of them, under terms or conditions of payment being made therefor at any day or days after such contract entered into, if any sum of the purchase-money or interest shall not be paid for the space of thirty days after the same ought to be paid, the commissioners, or any two of them, may sell the same lots at public vendue, in the city of Washington, at any time after sixty days' notice of such sale, in some of the public newspapers of Georgetown and Baltimore town, and retain in their hands sufficient of the money produced by such new sale to satisfy all principal and interest due on the first contract, together with the expenses of advertisement and sale; and the original purchaser, or his assigns, shall be entitled to receive from the said commissioners, at their treasury, on demand, the balance of the money which may have been actually received by them, or under their order, on the said second sale; and all lots so sold shall be freed and acquitted of all claim, legal and equitable, of the first purchaser, his heirs and assigns." These powers and duties of the commissioners of the city of Washington were afterwards by an Act of Congress transferred to a superintendent, and the Act of Congress of 1st May, 1802, c. 41, § 6, [2 Stat. at Large, 176,] directs the superintendent to sell all the lots which were sold before the 6th of May, 1796, "and which the commissioners are authorized to resell in consequence of a failure on the part of the purchasers to comply with their contracts." The defendant had failed to comply with his contract for the purchase of these two lots, and the superintendent sold them to Andrew Ross on the 2d of September, 1802, for eighty dollars, and at the request of Ross conveyed them to James Moore on the 17th of September, 1802, having received the purchase-money, namely, 80 dollars, which the superintendent passed to the credit of Morris & Greenleaf, on account of their purchase of the six thousand lots, and then brought this suit in the name of the former commissioners, to whom the note was payable, intending to recover from the defendant the difference between the amount which he agreed to pay for the lots, and the price for which they were sold to Ross. The deed from the superintendent

to Moore stated the default to be in Morris & Greenleaf, in not paying for the six thousand lots, and says nothing of the sale to the defendant, O'Neale.

Upon this state of facts, *Mr. Morsell*, *Mr. Jones*, and *Mr. P. B. Key*, for the defendant, prayed the Court to instruct the jury, that the plaintiffs could not recover upon this note. 1. That the commissioners had an election to take their remedy *in personam*, or *in rem*, but could not pursue both; and that by the sale of the lots they made their election, and abandoned their remedy against the person. 2. That the superintendent had no right to sell to Ross; but having done so, and conveyed away the title, they had abandoned the contract with O'Neale, and had treated it as a nullity. 3. That the sale to O'Neale was conditional, with power in the commissioners to resell and vacate the contract. 4. That the contract was void by the Statute of Frauds, because there was no note, nor memorandum of the agreement in writing, and therefore there was no consideration for the note.

1. The commissioners had an election of remedies. When a man has an election he cannot pursue both. If a mortgagee brings ejectment and recovers possession of the land, he cannot afterward sue for the debt. So, if a landlord distrain for rent, he cannot have an action of debt. So, if a person, having a rent charge, distrain, he cannot have a writ of annuity. So, if a man brings his action at common law, he waives his remedy by statute. 2 Inst. 200. 2d. The superintendent had no right to sell to Ross. A special authority, in derogation of the common law, must be construed strictly. The superintendent had only authority, by the Act of 1 May, 1802, to sell lots which were sold before the 6th of May, 1796, "and which the commissioners were authorized by law to resell in consequence of a failure on the part of the purchasers to comply with their contracts." The only authority which the commissioners had to resell lots for the default of the first purchaser, was under the Act of Maryland, 1793, c. 58, § 2. That act only authorizes one resale of the same lot, and the proceeds of such "new sale" are to satisfy the principal and interest due on the "first contract," and the "original purchaser" is to receive the surplus, if there should be any, on the "second sale," and the lots resold are to be free of all claim, legal or equitable, of the "first purchaser." The legislature intended that the second sale should be for cash. The act does not authorize them to sell on credit, but if it does, the whole proceeds of the third sale are to go to the credit of the first purchaser, so that the intermediate purchaser is to derive no benefit from the enhanced price. With what justice, then, can he be made responsible for the loss on the third sale? The commissioners cannot withdraw the consider-

ation and yet hold the defendant to the contract. They cannot vacate the contract as to themselves, and yet hold the defendant bound. 3d. The commissioners themselves have considered and treated it as a conditional sale, and as having a right to vacate it if the purchase-money should not be punctually paid; and they cannot now deny it. 4th. It is void by the Statute of Frauds. The memorandum by the clerk of the commissioners, who acted as auctioneer, is not such a note in writing as the statute requires. It must be such a writing as will bind the party. It must be delivered. If it was not such a writing as the plaintiffs were bound to perform, it cannot bind the defendant. 1 Bac. Ab. 115, tit. Annuity, C., Stat. of Frauds; *Whitchurch v. Bevis*, 2 Bro. Ch. Ca. 559; *Hawkins v. Holmes*, 1 P. Wms. 770, 771; 7 Bac. Ab. (Gwillim,) tit. Agreement; *Cook v. Toombs*, Anstr. 420. Giving the note for the purchase-money was not such a part performance as will take the case out of the Statute of Frauds. 1 Bac. Ab. 121, tit. Agreement, C.

Mr. Mason, contra. 1. The Statute of Frauds does not affect the consideration of the note. The receiving of the notes was in part execution of the contract. The advertisement of the terms of sale was signed by the commissioners. The lots were sold at auction, and the price of the lots, and the name of O'Neale as the purchaser, were entered in the sales-book by the clerk of the commissioners. 2. The commissioners were public agents with delegated powers. Their acts, within those powers, were valid. But if they exceeded their powers, their acts are void, and the public are not bound by them. The public are not estopped by their admissions or concessions or constructions. Their disposition of the proceeds of the sale cannot affect their right to sell. Their power extended to all sales on credit, past, present, or future. They had an unquestionable right to sell the lots to O'Neale. The contract with him was valid. There was a good consideration for the note when it was given. The equity of Morris & Greenleaf was gone by the sale, even before the money was paid. The commissioners were not bound to sell for cash; nor to give credit to Morris & Greenleaf for the amount of the sales until actually received by them. Morris & Greenleaf lost their equitable title to the lots, but in lieu thereof, were entitled to the surplus arising upon the second sale. The commissioners held it as their trustees, and could not release O'Neale from his bargain, but were bound to enforce it for the benefit of Morris & Greenleaf.

The Act of Maryland, 1793, c. 58, § 2, did not give any new security. It only hastened the remedy, by substituting a resale for the ordinary decree in chancery for the sale of the land, when

the purchaser has failed to pay the purchase-money; and under such a decree, the trustee would have no power to rescind his sale, but would be bound to enforce it for the benefit of the first vendee. It is true that if a mortgagee forecloses the mortgage, and obtains possession, it is satisfaction, but not if the decree be for the sale; for in that case the mortgagor remains liable for the deficit, and is entitled to the surplus. The act does not limit the commissioners to one of two remedies. They may pursue both until they obtain satisfaction. It did not mean to deprive them of any benefit which they had before. If the commissioners had no authority to sell the lots to Ross, the sale to him was void, and O'Neale may still compel the commissioners to convey them to him. Morris & Greenleaf had a right to the surplus arising on the sale to O'Neale, and O'Neale would have a right to the surplus beyond the amount due from him, if any had arisen upon the sale to Ross. Being entitled to the surplus, if any, he must submit to the loss.

The COURT refused to give the instruction prayed by the defendant's counsel.

CRANCH, J., *contra*. O'Neale would not have been entitled to the surplus, if there had been any, on the sale to Ross, and therefore ought not to be liable for the deficit. That is, as he would not have been entitled to the difference between what he agreed to pay to the commissioners for the lots, and what they would have received from Ross, if they had sold to Ross for a greater sum than O'Neale had agreed to give; the plaintiffs have no right to charge the defendant with the difference in the present case. The counsel for the plaintiffs has contended that O'Neale would have been entitled to the surplus, if any, and therefore he is liable for the deficit. If O'Neale would have been so entitled, the case would stand thus:

Suppose the 1st sale to Morris & Greenleaf was for	\$100
the sale to O'Neale for	50
the sale to Ross for	150

which last sum the plaintiffs have received; what then would be the rights of the parties?

O'Neale would be entitled to receive	\$100
And the Act of 1793 says the commissioners shall retain the amount due from the first purchaser, Morris & Greenleaf,	100
which make	<u>\$200</u>

But the whole sum is only \$150, which shows it to be impossible that such should be the rights of the parties. Then the right of O'Neale or of the commissioners must be withdrawn. But the right of the commissioners to retain \$100 due from Morris &

Greenleaf, is supported by the express words of the Act of 1793. The right of O'Neale is only supported by implication and analogy. The impossibility that both rights can exist at the same time, totally destroys that implication. The right of O'Neale to the surplus, therefore, cannot exist; it must yield to the superior right of the commissioners. The ground, therefore, on which the plaintiffs' counsel relies, is gone.

The question then, is, whether the plaintiffs can recover on the notes, if O'Neale would not have been entitled to the surplus, if there had been any, on the sale to Ross? The notes were given for the purchase of lots, which lots the plaintiffs have sold to others since the notes became payable. It is true the notes were originally given on a valuable consideration, viz., the plaintiffs' promise to convey the lots on payment of the money. After the default of the defendant in not paying the notes, the plaintiffs were no longer bound to convey the lots; they had then a right to disaffirm the agreement, and the defendant, on tendering the money after the day of payment, could not recover damages at law against the plaintiffs for not conveying the lots. The plaintiffs had a right to release the defendant from the contract. Have they done so? If they have not at law, they clearly have in equity. If O'Neale is not entitled to the benefit of the sale to Ross, and the plaintiffs are entitled to recover upon the notes, they are entitled to recover the whole sum. But if they should recover judgment at law, the defendant would enjoin the judgment in equity; and upon showing that the plaintiffs at law had sold the property to another and received its value, equity would decree that the money arising from the sale, should go in discharge of the notes.

The sale by the plaintiffs to Ross, was either in affirmance or in disaffirmance of their sale to the defendant. If it was in affirmance, then the sale to Ross was at the risk and for the benefit of the defendant. And if the sale in this case was at the risk of the defendant, it would have been for his benefit, if the sale had produced more than his notes. The principle must be the same in both cases. There can be no middle principle which can make him liable for the loss, and not give him the chance of gain. If there had been a surplus on the sale to Ross, there is no principle by which the defendant could be credited for no more than the amount of his notes. But I have shown that the defendant could not by law receive the benefit of the sale to Ross. Hence the sale to Ross cannot be considered as in affirmance of the contract with the defendant. It must, therefore, be in disaffirmance of that contract. But the plaintiffs must be consistent throughout. They cannot disaffirm for the purpose of selling the lots to Ross, and at

the same time affirm it by holding the defendant liable on his notes.

The resale, authorized by the Act of 1793, is in affirmance of the contract of sale to the first purchaser. The lots are resold, not as the property of the commissioners, but of the first purchaser. So on a bill in chancery by a vendor of land, praying for a sale of the land to satisfy the purchase-money due from the vendee to the vendor, such a decree and such a sale are made in affirmance of the first contract; and the land is sold under the decree, not as the land of the vendor, (the complainant in equity,) but of the vendee. Such decrees are grounded on the idea that the vendor has a specific lien only on the land, like a mortgage, and that the vendee is entitled to the benefit of the increased value of the thing sold, if its value has increased, and liable for its depreciation, if its value has been diminished. It is founded on the principle, that by the contract, the right to the land is transferred to the vendee, and the right to the purchase-money to the vendor. Hence it was just and equitable, that, on the resale by the commissioners, (which by the Act of 1793 is substituted for a resale under a decree in chancery,) the surplus, after retaining the amount of the first purchase-money, should be paid over to the first purchaser.

It is important to bear in mind, that when the commissioners resell a lot under that Act of Assembly, they do not sell it as their own property, but as the property of the first purchaser. They act as his agents or trustees, and not in their own right. But the Act of Assembly was made for the sole benefit of the commissioners, as agents of the public, and to enable them to collect the public money. It was not intended to apply to sales made by individuals; it meant to embrace those sales only which the commissioners should make as agents for the public, and not those which they might make as the agents or trustees of an individual. The Act of Assembly operates merely as a statutory decree for the resale of all lots sold by them as agents for the public, upon default being made by the first purchaser, and it is only for his default, and to satisfy his debt to the public. The commissioners, for this purpose, stand in the place of a trustee appointed to sell under a decree in chancery. The Act of Assembly does not say whether the resale shall be for cash, or on credit; nor does it expressly leave that matter to the discretion of the commissioners. But as the object of the act is to raise money from the resale of the lots, and as the act does not authorize a resale, but for the default, and as the property of the first purchaser, it is a fair inference, that they were obliged to sell for cash; or, that if they resold on credit, the resale was to be considered void, unless the money was duly paid, according to the terms of such resale.

Ex parte Burford.

The act authorized them to sell only the property of the first purchaser. Upon the fault of the second purchaser, the commissioners could not sell to a third purchaser without considering the second sale as void; because, as they were only authorized to sell the right of the first purchaser, and as they had once sold that, there was nothing left for them to sell while the second sale remained valid. Again, the parties to the second sale had certainly a right by mutual assent to dissolve the contract. The commissioners have given the most unequivocal evidence of such assent on their part, because they have done that act which they could not lawfully do while that contract remained in force. They have sold and conveyed to another the very subject-matter of the contract. No written instrument, no solemn specialty, could more clearly demonstrate its dissolution. The assent of the defendant to the same dissolution was evidenced (prior to that of the commissioners) by his refusal to pay the notes. By that act he waived the contract, and at law could never insist upon its performance. His assent is further testified by the present defence which he now sets up.

The commissioners, having no right to sell for the default of O'Neale, and having no right to sell the lots as the property of O'Neale, but having sold for the default of Morris & Greenleaf, and as their property, (for whose default and as whose property only they were authorized by the act to sell) have completely disaffirmed the contract with O'Neale; and, having done so, they must act consistently throughout: the disaffirmance goes back to the inception of the contract, and prevents them from saying there was any consideration for the notes at the time they were given.

Verdict and judgment for the plaintiffs. (Reversed by the Supreme Court of the U. S. 6 Cranch, 301.)

Ex parte JOHN ATKINS BURFORD.

An authority which may be exercised by an individual magistrate may be exercised by many jointly.

A warrant of commitment must state probable cause, supported by oath or affirmation.

HABEAS CORPUS, *ad subjiciendum*. The return states a warrant, from a large number of justices, to bring before them the prisoner, to find sureties for his good behavior. The form is the same as that in 4 Burn's Justice, 256; and an order that he find surety in the sum of \$4000, and a *mittimus* for want of surety, in the following form:

Ex parte Burford.

"*Alexandria County, ss.*—The undersigned, justices of the United States, assigned to keep the peace, within the said county, to the marshal of the district, and all and singular the constables, and other officers of the said county, greeting:—Forasmuch as we are given to understand, from the information, testimony, and complaint of many credible persons, that John A. Burford, of the said county, shopkeeper, is not of good name and fame, nor of honest conversation, but an evil-doer and disturber of the peace of the United States, so that murder, homicide, strifes, discord, and other grievances and damages, amongst the citizens of the United States, concerning their bodies and property, are likely to arise thereby—Therefore, on the behalf of the United States, we command you, and every of you, that you omit not, by reason of any liberty within the county aforesaid, but that you attach, or one of you do attach, the body of the said John A. Burford, so that you have him before us, or other justices of the said county, as soon as he can be taken, to find and offer sufficient surety and mainprise for his good behavior towards the said United States, and the citizens thereof, according to the form of the statute in such case made and provided. And this you shall in nowise omit, on the peril that shall ensue thereon, and have you before us this precept. Given under our hands and seals, in the county aforesaid, this 21st day of December, 1805."

Mr. Hiort, for the prisoner. The mittimus ought to show a legal ground of commitment, supported by oath of persons named; and state how long the sureties are to be held bound for his good behavior, otherwise it amounts to imprisonment for life. It is a general warrant. It does not specify a crime. Boscowen on Penal Statutes, 9; *Rex v. Little*, 1 Burr. 613, 2281; 1 Salk. 181. As no sufficient cause was expressed, the jailer was not bound to receive him, and cannot lawfully detain him. 1 Bl. 137; 2 Inst. 52, 53; 4 Bl. 255. The justices could not bind over to the good behavior on their own knowledge. They could not do it without an oath. General information is not sufficient. 1 Hawk. c. 61, § 4, note. By the 6th amendment of the Constitution of the United States "no warrants shall issue but upon probable cause, supported by oath or affirmation;" and by the 10th amendment, excessive bail shall not be required. In the present case the bail was excessive. He was charged with no offence, nor even with being of ill-fame, and yet these justices have required bail in the sum of four thousand dollars. The justices had no authority to act jointly. By the Act of Congress of 27th February, 1801, [2 Stat. at Large, 103,] they have only the powers of individual magistrates. They have no power as a court. They can only exercise, each for himself, the powers given by law to single or indi-

 United States v. Morgan.

vidual magistrates. Whose act is this? They cannot act jointly. Then it amounts to several warrants. As a joint act it is extrajudicial; they have no joint authority. The mittimus says he was brought before a meeting of many of the justices of the peace, yet only one could act, and the warrant does not say which.

Mr. Jones, contra. The justices were not bound to state the evidence which satisfied them that he was a person of evil fame. It is no objection that the time for which he was to be bound, is not stated. The acts of the magistrates must be presumed to be right until the contrary appears.

Mr. Youngs and Mr. Swann, in reply. The oath which justifies the warrant to arrest and bring the party before the magistrate, will not justify the jailer to hold him under the warrant of commitment, if the commitment does not state a charge or conviction upon oath. But the warrant to arrest was itself illegal. It did not state the name of the person on whose oath it was grounded, so that the prisoner could bring evidence to discredit the witness; or to convict him of perjury; or to have his action for a malicious prosecution. The constitution says that the party shall have a right to be confronted with the witnesses against him. The commitment does not state that any witnesses were examined before them at the time he was brought before the justices.

The COURT refused to discharge the prisoner, but required surety, in one thousand dollars, for his good behavior for one year.

CRANCH, J., contra. The commitment is illegal, and is not aided by the warrant for arrest. That warrant is not referred to in the commitment; but if it can be brought in aid of the commitment, yet it ought to have stated the names of the persons on whose testimony it was granted, and the nature of the testimony, that this court may know what kind of ill-fame it was, and whether the justices have exercised their discretion properly. The question is, what authority can the jailer show for detaining him? The commitment is his only authority; and that is, in my opinion, insufficient.

Judgment reversed in the Supreme Court, and prisoner discharged. (3 Cranch, 448.)

UNITED STATES v. EVAN MORGAN.

A stockholder in the bank is a competent witness for the prosecution, in an indictment for receiving a stolen bank-note, the property of the bank, the witness having released to the United States all his interest in the fine.
Bank-notes are not goods and chattels.

• INDICTMENT for receiving a bank-note of the Bank of Alexan-

dria, the property of the President, Directors, & Company of the Bank of Columbia, knowing it to be stolen; against the form of the statute. Act of Congress of 1790, [1 Stat. at Large, 116.]

Mr. John Mason, the president of the Bank of Columbia, was offered as a witness on the part of the United States.

Mr. Caldwell, for the prisoner, objected that half the fine goes to the owners, who, in this case, are the Bank of Columbia, in which the witness is a stockholder.

Mr. Jones, for the United States, *contrà*. The section of the act respecting receiving stolen goods does not appropriate the fine, but only says the punishment shall be the same; the appropriation of the fine is no part of the punishment.

The COURT was of opinion, (*nem con.*) that the fine for receiving was to be appropriated in the same manner as the fine for stealing; and that there was such an interest as incapacitated the witness.

He released to the United States his interest, and was again offered as a witness.

It was again objected by *Mr. Caldwell*, that this would not prevent the bank from receiving the full half of the fine, and the witness would not be estopped from receiving his dividend upon his shares of stock, and, if he did not receive it at the first dividend, yet it would go to increase the general fund. The United States could not claim it, because it is not now *in esse*; and therefore the release can only operate as an estoppel to him personally, and transfers nothing.

The COURT permitted the witness to be sworn and examined.

Verdict, guilty.

Motion in arrest of judgment, because the words "goods and chattels," in the Act of Congress, do not include bank-notes. They are not goods or chattels. *Morris's case*, Leach, Cr. Ca. 208.

CRANCH, J., delivered the opinion of the Court. This is an indictment for a misdemeanor, in receiving a bank-note knowing it to be stolen. Bonds, bills, and notes, by the common law, were not held to be such goods whereof larceny could be committed, being of no intrinsic value, and not importing any property in possession of the person from whom they were taken. 4 Bl. Com. 234; 1 Hawk. 142, c. 33, § 22. The receiving of stolen goods, knowing them to be stolen, was, at common law, only a misdemeanor. But as the stealing of a bank-note was not a crime at common law, the receiving a bank-note knowing it to be stolen, was not even a misdemeanor. The Act of Congress under which the prisoner is indicted, [1 Stat. at Large, 116,] speaks of "goods and chattels" only. To know the meaning of the expression, "goods

 Fenwick v. Brent et als.

and chattels," we must resort to the common law, where we find that neither promissory notes, nor bank-notes, nor money, are included within that expression. Bank-notes, therefore, are not within the Act of Congress. But it has been contended that the Act of Maryland against stealing bank-notes, uses the words "other goods," thereby implying that bank-notes are goods. But if that was the case the act was wholly unnecessary, as the preëxisting law was abundantly sufficient for the punishment of stealers of goods. The foundation of the act itself, the evil which the act was intended to remedy, was that bank-notes were not goods in the eye of the law, and therefore it was no offence to steal them. The counsel for the United States relied much upon the case of *Rex v. Woods*, cited in note to 1 Hawk. 232, (c. 58, App. 7,) from 3 Select Trials, 195, which case we have not seen. The note of it in Hawkins, seems rather to be an inference of the editor, than an abridgment of the case itself, and this inference is expressly contradicted by the case of *Rex v. Morris*, in Leach, Cr. Ca., in which it was decided by the twelve judges that the receiving bank-notes knowing them to be stolen, was not a misdemeanor within any of the British statutes. The case then remains upon the common law definition of goods and chattels. The judgment must be arrested.

JAMES DAVIDSON, for the Use of the Bank of the United States,
v. DANIEL HENOP.

If there be only one issue, and the defendant holds the affirmative of that issue, he has a right to open and close the argument.

ASSUMPSIT, on a promissory note. The defendant pleaded infancy only, upon which the issue was joined.

The COURT was of opinion that the plaintiff was not obliged to produce the promissory note mentioned in the declaration, but that the defendant held the affirmative of the issue, and had a right to begin and close the argument.

FENWICK v. ROBERT BRENT & others.

When there is a rule to employ new counsel, the cause may be continued after the fifth term, notwithstanding the Acts of Maryland of November, 1787, c. 9, and 1721, c. 14.

ASSUMPSIT. A rule had been laid, at the term before the last, on the plaintiff, to employ new counsel. At the last term the

 Ferris & Gilpin v. Williams.

Court made a general order, that in all cases where such rules had been laid, they must be served upon the party, if in the District of Columbia, but if not in the district, the rules must be published in a certain mode prescribed by this order. Neither of these modes of service had been pursued; but this suit was brought to July term, 1801, and having been more than five terms continued, *Mr. Mason* urged the Acts of Assembly, of November, 1787, c. 9, and 1721, c. 14.

But the COURT continued the cause.

 DUANE v. RIND.

If the plaintiff has not a domicil in this district, he may be ruled to give security for costs.

MOTION, by the defendant, for a rule on the plaintiff, to give security for costs, on the ground that the plaintiff is a non-resident. The facts admitted were that the plaintiff has a large bookstore in this city, and occasionally resides here during the winter, has a family, and now resides at Philadelphia. His family never has resided here. He has a storekeeper here. The marshal has applied at the store and received pay for fees regularly. See the Act of Maryland, 1796, c. 43, § 12.

The COURT (KILTY, C. J., absent,) was of opinion that the rule ought to be laid. The Act of Assembly, 1796, c. 43, § 12, must be understood to refer to the domicil, the place where the party resides, with his wife and children, if he has any.

 FERRIS & GILPIN v. WILLIAMS.

Leave to amend on payment of full costs.

THE writ was to answer to "Ferris & Gilpin." The declaration was in blank, as to dates and sums, and was for goods, &c., delivered. The defendant had pleaded *non assumpsit*, and the Statute of Limitations, and the plaintiff had filed a general replication.

Mr. Mason, for the plaintiffs, moved to amend the pleadings, and to reply specially to the plea of limitations, stating that the plaintiffs were beyond the seas (that is, in the State of Delaware.)

Leave was given to the plaintiffs to amend all the proceedings on the payment of full costs to this time.

KILTY, C. J., absent.

MANNING v. LOWDERMILK.

Delivery of the cargo to the owners, by the supercargo, is evidence of his receipt of his commissions in an action against him by a third person, who is entitled to a share of those commissions.

MONEY HAD AND RECEIVED. The evidence was a verbal agreement between the plaintiff and the defendant to share the commissions on the sales of a cargo in the West Indies, the plaintiff being master, and the defendant supercargo. There was no special agreement stated in the declaration; and there was no evidence that the defendant had actually received the commissions.

Mr. Key, for the defendant. The plaintiff must prove money actually received by the defendant, or must give in evidence such an instrument as the law makes evidence of money had and received.

Mr. Morsell, for the plaintiff. The defendant had a lien on the goods or the money for his commissions; and if he relinquished that lien without the assent of the plaintiff, he ought to be liable.

Mr. Mason, on the same side. Actual receipt of money, *in numero*, is not absolutely necessary. If I sell another man's horse and receive corn in payment, he may bring and support this action. If I sell the horse for cash on credit, and receive payment in corn, it lies. The receipt of the purchase-money for the flour, was a receipt of his commissions. The motion is to instruct the jury that the plaintiff cannot recover in this form of action, unless the money was actually received, or such evidence is produced as will prevent the defendant from denying the receipt of the money.

The opinion of the Court was, that the jury must be satisfied that the defendant received the money, but that the delivery of the inward cargo to the owners, without the consent of the plaintiff, is evidence of the defendant's receipt of his commissions, which the defendant in this case ought not to be permitted to deny.

KILTY, C. J., absent.

Note. KILTY, C. J., was appointed Chancellor of Maryland, on the 26th of January, 1806, and did not afterwards sit in this Court.

BAYLEY v. DUVALL.

If money paid in advance is to be forfeited in case the residue be not paid by a certain day, the party who is to pay must tender or use his best endeavor to tender the balance due on or before the day limited.

MONEY HAD AND RECEIVED, to recover one hundred and eighty dollars paid in advance for the purchase of the horse Yorick. The plaintiff paid the defendant one hundred and eighty dollars, in advance, for the horse, which was to be delivered to plaintiff at a future day, on payment of the balance, and if the balance should not be paid on or before that future day, the advance-money should be forfeited. The defendant's prayer in effect was that the plaintiff must prove an actual tender of the balance, or that he attended at the defendant's house on the last day ready to pay, and that the defendant was not at home, &c.

The Court was of opinion, that if it was understood by the parties that the money was to be paid and the horse delivered to the plaintiff at the defendant's house, it was incumbent on the plaintiff to prove a tender within the time, or that he attended at the defendant's house on the last day ready to pay, and that the defendant was not there. If no place was understood between the parties, the plaintiff should have used reasonable diligence and endeavors to find the defendant and tender him the money, on or before the last day.

PHILLIPS *et al.* v. LOWNDES.

When an execution is countermanded at the request of the defendant and for his accommodation, the plaintiff may have a new execution, after the year and day, without *scire facias*.

THE plaintiffs had obtained judgment against the defendant at July term, 1804. A *ca. sa.* was issued, November 8, 1804, which was countermanded by the plaintiffs, and a *feri facias* issued on the 21st November, 1804, which was also countermanded. On the 29th of December, 1805, Mr. Swann, for the plaintiffs, applied to the clerk for a new execution, which the clerk declined to issue, as the year and day had elapsed since the issuing of the last.

Mr. Swann now moved the Court to instruct the clerk to issue a new execution, and in support of the motion filed an affidavit that the delay was at the defendant's request, and for his accom-

United States v. Johns.

modation, and cited the case of *Mitchell v. Cue et ux.* 2 Burr] 660.

Upon the authority of which case, the COURT permitted the plaintiff to take out his execution, leaving it open to a motion to quash, at its return. The Court also examined the following authorities: 2 Show. 235; Carth. 283; Comb. 232; 2 Just. 471; Co. Lit. 290 (b.); 2 Leon. 77, 78, 87; 3 Leon. 259; 4 Leon. 44; 1 Sid. 59; 1 Keb. 159; 6 Mod. 288.

UNITED STATES v. R. JOHNS.

In actions upon duty-bonds, the United States are entitled to judgment at the return term.

DEBT on a duty-bond, returnable to this term; special bail. The defendant appeared in proper person.

Mr. Jones, Attorney for the United States, on the last day of the sitting of the Court, moved for, and obtained a rule on the defendant to plead *instante*.

The defendant being called, and not appearing, judgment was entered by default, for the penalty to be released on payment of the sum mentioned in the condition, with interest and costs. See the Act of Congress, March 2d, 1799, § 65, [1 Stat. at Large, 676.]

CIRCUIT COURT OF THE UNITED STATES.

MARCH, 1806, ADJOURNED SESSION:¹ NOVEMBER TERM, 1805,
AT ALEXANDRIA.

McCULLOCH v. DEBUTTS.

When the writ of inquiry is set aside by the defendant, the plaintiff may have the cause continued at the defendant's costs.

Mr. Youngs, for the defendant, set aside the office judgment, and pleaded not guilty.

Mr. E. J. Lee, for the plaintiff, elected a continuance, and said it was the practice in such cases that the continuance should be at the costs of the defendant, although the defendant offered ready.

The COURT inquired of the clerk, who said such was the practice.

Continued, at the costs of the defendant.

MANNING v. JAMESSON & YOUNG.

Counter-affidavits cannot be read on a motion for a continuance of the cause.

Mr. Taylor, made an affidavit for a continuance. A counter-affidavit was read, but the COURT said they would not consider the reading of it as a precedent.

HADEN v. PERRY.

Judgment cannot be confessed before the return term of the writ.

THE defendant was arrested on a writ returnable to the next term.

¹ William Kilty, C. J., having been appointed Chancellor of Maryland, William Cranch, Assistant Judge, was, by the President of the United States, appointed Chief Judge in his place; and Allen Bowie Duckett appointed Assistant Judge.

 Governor of Virginia v. Turner's Sureties.

Mr. Taylor, for the defendants, moved for a *habeas corpus*, to bring up the defendant to confess judgment at this term, and cited the Act of Assembly of Virginia of 19th December, 1792, § 43, p. 113, that a confession of judgment is equal to a release of errors.

But the COURT overruled the motion. See *McNeil v. Cannon*, June term, 1803, [*ante*, 127,] and *Smith v. McCue*, or *Askew v. Smith*, March adjourned term, 1804, [*ante*, 159.]

 DEBUTTS v. McCULLOCH.

It is not necessary that the notice of taking a deposition under the Act of Congress should state the reason for taking it.

MR. E. J. LEE objected to the deposition of Joseph Grant, taken under the Act of Congress, that the notice did not state the reason of taking it.

The COURT overruled the objection to the deposition, and suffered it to be read.

 THE GOVERNOR OF VIRGINIA v. TURNER'S SURETIES.

The sureties of a sheriff in Virginia are not liable for officers' fees, unless the account of the same shall have been delivered to the sheriff for collection before the first of March, according to the Act of Assembly of 19 December, 1792, § 11, p. 219.

DEBT on sheriff's bond; plea, conditions performed; replication, that on the 5th of May, 1800, one Bedinger, clerk of Berkeley county, put into Turner's hands, to be collected and accounted for according to law, tickets of fees due to Bedinger as clerk amounting to \$175 and 32 cents, for which fees Turner was bound to have accounted before the first of September ensuing, and to have paid over to Bedinger, which he did not do. To this replication there was a general rejoinder and issue, and verdict for the plaintiff.

FITZHUGH, J., delivered the following opinion of the COURT.

By the Virginia Laws, p. 217, § 7, no fees are payable until there shall be produced to the person chargeable, an account in writing, &c.; by § 11, the clerks shall annually, before the first of March, deliver to the sheriff their accounts of fees, &c.; by § 12, the sheriff is to receive such accounts and collect, &c., from the persons chargeable, and if such persons, after the said fees shall be demanded, shall refuse or delay to pay till after April 10th, in every year, the sheriff may distrain; by § 13, the sheriffs

Davis v. Sherron.

shall, "on or before the last of May" (afterwards 1st September) "annually, account with the clerks for fees put into their hands to collect pursuant to this act."

The law then obliges the sheriff to account, on or before 1st September, for fees put into his hands before 1st March, but these fees were not put in before the 1st March. Therefore, by that law, he was not bound to collect or account for them before the 1st September, the not doing which, is the breach assigned.

The replication, indeed, charges that he never accounted, but the condition of the bond is, that he shall account at such times as are limited by law; if no time is limited, there can be no breach of that part of the condition. The fees not being put into his hands before 1st March, he was not bound to receive the list, or if he did, he was not bound (because he had no power) to collect. If collected, it was by him as a private person, and not in his official character; and if, after collecting, he had refused to pay, it was no breach of his official duty so as to charge his sureties. The replication, therefore, does not assign a breach of the condition of the bond; the issue was immaterial, and the judgment must be arrested.

DAVIS AND WIFE v. SHERRON AND WIFE.

Words spoken of one of the plaintiffs cannot be given in evidence to support an averment of words spoken of both plaintiffs; nor can words spoken by each defendant separately, and out of the presence of each other, be given in evidence to support an averment of words spoken jointly by the defendants.
An attachment cannot be served in court.

SLANDER. The declaration charges, that the defendants jointly said the plaintiffs were robbers, or thieves.

The COURT instructed the jury, that words spoken of one of the plaintiffs only, cannot be given in evidence to support the declaration. And that words spoken by each of the defendants separately, and not in the presence of each other, cannot be given in evidence upon this declaration, which charges a joint speaking.

Nonsuit. Motion to reinstate, refused.

Robert McMunn was attached as a witness. The attachment was served in the gallery of the court-room. The COURT said that the service was not good, being in court.

RIDDLE v. POTTER.

A plea of the pendency of a former suit in another court, must offer to produce the record of such suit.

PLEA in abatement—pendency of a former suit in Fairfax county, Virginia. Demurrer, special; because, 1. A suit in Fairfax is no bar to a suit here. 2. A suit in chancery is no bar to a suit at law. 3. There is no *profert* of a record of the case in Fairfax.

The COURT overruled the plea, and gave judgment of *respond-eas ouster*, principally on the ground that the plea did not state any matter of record; and that the pendency of a former suit is no bar, unless the proceedings in that suit are matter of record.

After the opinion was given, *Mr. Swann* prayed leave to amend in that respect; but the Court being informed, and the fact being agreed by the parties, that the suit in chancery had been dismissed, refused leave to amend.

The COURT gave no opinion on the two first causes assigned, but said it had been decided in this Court, that a judgment of a court of record in one of the United States, was not a foreign judgment in any of the other States.

Mr. E. J. Lee, for the plaintiff. *Mr. Swann*, for the defendant.

ASSIGNEES OF HARMON & DAVIS v. JAMESSON.

Under the bankrupt law, an attaching creditor was entitled to only a ratable part of his debt, with the other creditors; and that part was to be ascertained by the assignees, under the direction of commissioners.

CRANCH, C. J., delivered the opinion of the Court. Sacket, Doolittle, Allison, and others, creditors of Harmon & Davis, attached the money of the bankrupts, before their bankruptcy, in the hands of Jamesson. During the pendency of these attachments, Harmon & Davis became bankrupts, and a commission issued, upon which they have been discharged, and a dividend of 10 per cent. has been made.

The defendant, Jamesson, by his answer, admitted \$867 of the effects of Harmon & Davis to be in his hands, ready to be paid as the Court should order. This money has been brought into court, and the question is, whether it shall be decreed to be paid over to the assignees of Harmon & Davis, to be distributed according to the bankrupt law, or whether this court will decree

to each of the attaching creditors, "a ratable part of his debt, with the other creditors of the bankrupt," who have proved their debts under the commission, and received their dividend of 10 per cent. This question depends upon the construction of the 31st section of the Bankrupt Law, [2 Stat. at Large, 30] which is in these words :

"That in the distribution of the bankrupt's effects, there shall be paid to every of the creditors, a portion-rate, according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance, or specialty, or having an attachment under any of the laws of the individual States, or of the United States, on the estate of such bankrupt, (provided there be no execution executed upon any of the real or personal estate of such bankrupt, before the time he or she became bankrupt,) shall not be relieved upon any such judgment, statute, recognizance, specialty, or attachment for more than a ratable part of his debt, with the other creditors of the bankrupt."

By this section, then, a creditor "having an attachment," "shall not," "in the distribution of the bankrupt's effects," "be relieved" "upon such attachment, for more than a ratable part of his debt, with the other creditors of the bankrupt." But this, it is said, implies that he shall be relieved upon such attachment for a ratable part, and therefore this court cannot decree the whole to be paid over to the assignees. But he is only to be relieved for his ratable part, in the distribution of the bankrupt's effects. What then is a distribution of the bankrupt's effects? By going back to the 29th section, we shall find an answer. It is a distribution among such of the bankrupt's creditors as have duly proved their debts under the commission, and is to be made by the commissioners and assignees. By the 30th section, a second, or any subsequent dividend, is to be made "by like order of the commissioners," "amongst such of the bankrupt's creditors as shall have made due proof of their debts." The word *distribution*, has a technical meaning, prescribed by the statute. The Court understands the 31st section to mean, that in the distribution of the bankrupt's effects by the assignees under the order of the commissioners, an attaching creditor, who has duly proved his debt under the commission, shall not be relieved upon the attachment for more than a ratable part of his debt. If this negative proposition implies an affirmative, the affirmative proposition must be correspondent to the negative. This affirmative proposition can only be, that in the distribution of the effects by the assignees under the order of the commissioners, the attaching creditor, who has duly proved his debt under the commis-

Koones v. Thomee.

sion, shall be relieved upon his attachment for a ratable part of his debt.

This construction seems to arise so obviously, upon an attentive reading of the Act of Congress, that the Court cannot deem it necessary to go into a detail of the arguments which support it. It may, however, be observed, that, by the Act, the commissioners are constituted the sole tribunal competent to receive proof of debts against the bankrupt's estate. They are also the only competent tribunal to make the order for a dividend, and to ascertain its amount. There can be no distribution, but by their order. A debt, proved before this Court, is not a debt duly proved under the commission; and a distribution made by this Court, is not a distribution within the meaning of the Act.

The general object of the Bankrupt Law, was to distribute the effects of the bankrupt, equally among his creditors, and to prevent priorities and preferences. Hence it avoids all assignments and transfers of property made on the eve, or in contemplation of bankruptcy. This wise provision of the law, might, however, be completely defeated, by permitting attaching creditors to gain a priority. Hence it provides, that no such creditor shall be relieved on such attachment, for more than a ratable part of his debt, with the other creditors. Of what use, then, could it be to say, that the attachment should be a lien for such ratable part, when the creditor would be equally entitled to his ratable part without such a lien? The law could not presume that the commissioners or the assignees (the very persons intrusted and commanded by the law to distribute the effects) would not do their duty, and faithfully execute the command of the law.

The opinion of the COURT, therefore, is, that this Court cannot decree any part of the money to the attaching creditors, but that the whole must be paid over to the assignees, to be distributed according to law.

KOONES v. THOMEE.

The Act of Assembly of Virginia, of December 26th, 1792, § 13, which prevents a tavern-keeper from recovering more than \$5, for liquors sold in one year to one person, to be drank in the place where the tavern is kept, applies as well to boarders, as to others residing within twenty miles of the tavern.

In an action of assumpsit, for boarding, lodging, and liquors, brought by the plaintiff, who was a tavern-keeper,

Mr. Swann, for the defendant, moved the Court to instruct the jury, that the plaintiff cannot recover more than \$5 a year for liquors sold to be drank in the house. The words of the Act of

Assembly, of December 26, 1792, § 13, p. 204, are, "No keeper of a tavern shall recover more than \$5 for liquors sold within the space of a year, to one person residing less than twenty miles from such tavern, and drank or sold to be drank in the place where it is kept."

Mr. E. J. Lee contended that the law did not apply to boarders.

The COURT instructed the jury, that if they should be satisfied, by the evidence, that the plaintiff was a tavern-keeper, and that the defendant resided in the plaintiff's tavern, at the time the liquors were furnished to be drank in the house, the plaintiff was not entitled to recover more than \$5 a year for liquors sold; but if the jury should be satisfied that the plaintiff has a family or domicile more than twenty miles from the place where the liquor was sold, this law did not apply.

Verdict for the full claim; and the Court, after argument, refused to grant a new trial, which the plaintiff prayed for on the ground, that the verdict was against evidence and law.

CROUDSON & others v. LEONARD.

The Court is not bound to give an opinion *instanter*, on the trial of a cause, but may direct the point to be saved by a special verdict.

A sentence of condemnation in a foreign court, is not conclusive.

ASSUMPSIT, on a policy of insurance on the cargo of the brig *Fame*, from Alexandria, to, at, and from Barbadoes, and four other ports in the West Indies, and back to Alexandria; captured by the British ship *Centaur*, and condemned at Barbadoes, by a British vice-admiralty court, for attempting to break the blockade of Martinique.

Mr. C. Lee, for the plaintiffs, after stating that the law was not yet conclusively settled in the courts of the United States, upon the question whether the sentence of a foreign court of admiralty was conclusive evidence of the fact of violation of the neutral character of the captured vessel, in an action upon a policy of insurance, moved the Court to instruct the jury to find a special verdict, and cited the following authorities: *Vin. Ab.* 490, tit. Trial, B; *Regina v. Bewdley*, 1 P. Wms. 213; *Ridgeway*, 34; *Harg. Co. Lit.* 155, (b) note 5; 2 *Morgan's Essays*, 44; 3 *Tuck. Bl.* 376; *Wilson v. Rucker*, 1 Call, 500; *Watson v. Alexander*, 1 Wash. 354; 2 Wash. 274; *Picket v. Morris*, 2 Wash. 274; *Syme v. Butler*, 1 Call, 105, 112, 114.

Mr. Simms, for the defendant, *contra*. The question has been long settled, and there is nothing in the case which requires an extraordinary proceeding. The plaintiffs, if they please, may ask

the instruction of the Court, and take their bill of exception, if the opinion of the Court should be against them, or if the Court should refuse to instruct the jury.

The COURT stopped *Mr. Lee*, in reply, and said: The right of the party who requests the opinion of the Court is not to have an opinion *instanter*. If the point is saved in any manner, it is all he has a right to require. If the Court refuse to instruct the jury, but direct them to find a special verdict, by which the point of law will be saved, the Court will be excused; and their refusal to give an opinion *instanter* will not be error. The Court and bar must know that the question intended to be saved is not settled in this country. It has been decided differently by different courts. In Virginia it has been decided in one way, in New York in another. We think the fairest mode of saving the point is by a special verdict. It is least expensive and most expeditious, as the whole facts will be before the Supreme Court, and the judgment will be final. *Dowman's case*, 9 Co. 11 (b), 13 (a) and 14 (a).

The COURT directed the jury to find a special verdict.

The plaintiffs then offered evidence to disprove the ground of condemnation alleged in the sentence of the Vice Court of Admiralty at Barbadoes, to which the defendant objected; but the Court overruled the objection, and the defendant took a bill of exceptions.

The jury, not being able to agree, were discharged, by consent of the parties, and the cause was continued over to the next term. A special verdict was found at a subsequent term, upon which judgment was rendered for the plaintiff, which was reversed by the Supreme Court of the United States. 4 Cranch, 434.

ANN FAIRFAX v. FAIRFAX'S EXECUTOR.

If the jury find for the plaintiff on the issue of *plene administravit*, the plaintiff shall have judgment *de bonis testatoris*, for his whole debt.

Non assumpsit et plene administravit, general replication and issue.

Verdict. We of the jury find the issues for the plaintiff, and assess her damages at \$220²⁵/₁₀₀.

Mr. Swann, for the defendant, moved, in arrest of judgment, that the jury ought to have found specially that the defendant had in his hands goods unadministered sufficient to satisfy the debt; and relied on the case of *Booth v. Armstrong*, 2 Wash. 301.

The COURT (CRANCH, C. J., and FITZHUGH, J.) were of opinion that the finding was sufficient to support the judgment, and said: If a particular sum of assets less than the debt claimed by the

Ladd v. Wilson.

plaintiff had been found it would not have altered the judgment. It would still have been to recover the whole debt, *de bonis testatoris*. But the jury have in substance found that the defendant had assets sufficient to pay the debt, out of which the debt might have been made. They have found the issue for the plaintiff. The issue taken by the plaintiff, in her replication, is, that the defendant had at the time, &c., in his hands, goods and chattels of the testator to be administered more than sufficient to pay, &c., and out of which he might have paid, &c., and this she prays may be inquired of by the country; and the defendant likewise. There is no more necessity of the special finding on this issue than on the issue of *non assumpsit*. *Mary Shipley's case*, 8 Rep. 134; *Waterhouse v. Woodstreet*, Cro. Eliz. 592; *Gaudy v. Ingham*, Styles, 88. See *Oxenden v. Hobdy*, Freem. 351; Br. Executor, pl. 34, pl. 82; *Newman & Babbington's case*, Godbolt, 178; *Dorchester v. Webb*, Cro. Car. 373; Lex. test. 414.

Reversed in Supreme Court. 5 Cranch, 19.

LADD v. WILSON.

A clause in a charter-party, that "during obstruction of the navigation by ice the lay days are not to be counted," applies to such obstruction as prevents the lading of the vessel, as well as to such as prevents her going to sea.

Parol evidence cannot be admitted to vary or explain an unambiguous written agreement.

COVENANT, on a charter-party, for non-payment of demurrage.

The plaintiff agreed to allow twenty working lay days for the loading at Alexandria. The cargo was to be wheat. At the bottom of the charter-party were these words, which were inserted before signing: "It is, however, understood that during obstruction of the navigation by ice, the lay days are not to be counted."

Mr. Swann, for the plaintiff, prayed the Court to instruct the jury that the obstruction of the navigation by ice, meant the obstruction to the sailing of the vessel from Alexandria out to sea, and not any obstruction above or in the creeks and branches of the Potomac; which instruction the Court refused to give, but instructed them that no day in which the plaintiff was obstructed by the ice in loading the vessel, was to be counted one of the twenty working lay days.

Mr. E. J. Lee, for the defendant, offered a witness, Alexander Henderson, to prove that the usage of trade was, that demurrage was payable where the freight was payable, viz., that the demurrage in this case was to be paid in Spain although it accrued in Alexandria.

 Allen v. Thomas.

The COURT said there was no doubt as to the construction of the instrument, which must speak for itself. It cannot be varied by any such usage if proved. If it is matter of law the Court are to decide it. If matter of fact it cannot be admitted to explain an instrument in itself not ambiguous.

MAYOR, &c., OF ALEXANDRIA, for the Use of Ladd, v. PATTEN
AND SURETIES.

The plaintiff, upon a plea of tender, cannot take out the money and proceed for more.

PLEA of tender, &c. Before trial of the issue,

Mr. Swann, for the plaintiff, moved the Court for leave to take out the money and go on for the balance of his claim. Esp. N. P. 161.

The COURT thought the plaintiff could not take the money out and then proceed for more.

PRIME v. ROBERT McREA'S EXECUTORS AND HEIRS.

By the laws of Virginia, in 1801, a court of equity could decree a sale of one moiety of the fee-simple of the debtor's lands in the hands of the heir at law.

THE bill states that the plaintiff recovered judgment in Virginia, against McRea and Mease, for dollars, and received part from the estate of Mease. That McRea left certain real estate, which he prays may be sold to pay the balance of the debt.

Upon consideration of the cases of *Robinson v. Tonge*, 3 P. Wms. 398, and *Stileman v. Ashdown*, 2 Atk. 608, the COURT decreed that half the rents and half the real estate should be sold.

ALLEN v. THOMAS.

Cause may be shown against a decree *nisi*, at any time during the term, and before any other order is made.

BILL to foreclose a mortgage. Decree at March, 1805, to be final unless cause should be shown to the contrary by first day of June term, 1805. An answer was offered on the 13th day of the term. The plaintiff's counsel objected that the decree had become final, no cause having been shown by the first day of the term.

 Thompson & Veitch v. Jamesson.

But the COURT said that if a decree is to be final by a certain day in the next term, unless, &c., and cause be shown after the day during the term and before any other order is made, it is well. The answer, however, not being sufficient, the decree was made final.

Ex parte NEGRO ANTHONY.

A justice of the peace in Alexandria cannot commit a person as a runaway, unless according to the form of the Act of Assembly of Virginia, of 26th December, 1792, p. 246.

HABEAS CORPUS. On return it appeared that the prisoner was committed by a warrant under the hand of Mr. Justice Faw, in these words: "Alexandria County, ss. You are hereby required to receive into your custody negro Anthony, who was brought before me by Joseph Simpson, as a runaway, said to be a slave, the property of Mr. Richard West, of Prince George's county, Maryland, and him safely keep until he be thence discharged according to law. Given under my hand, this 19th day of April, 1806. A. Faw. Capt. James Campbell, Jailer."

The prisoner was discharged, on consideration of the Acts of Assembly, of 26 December, 1792, p. 246; 10 December, 1793; pp. 315, 316; and 21 January, 1801, p. 412.

THOMPSON & VEITCH v. R. B. JAMESSON.

A court of equity will not decree the execution of a verbal agreement to pay the debt of another, although confessed in the answer, if the Statute of Frauds be pleaded and insisted upon in the answer.

BILL to charge the defendant for goods furnished to Samuel M. Brown, at the request of defendant. The plaintiffs sold the goods to Brown on the credit of the defendant. Brown is dead, insolvent; and the defendant or his agent administered on his estate. Plaintiffs heretofore filed a bill in equity to offset this demand against a judgment of Mandeville & Jamesson, and Jamesson's answer and plea are exhibited.

Mr. Swann, for the plaintiffs. If a verbal promise to pay for the debt of another be not in writing, yet if the defendant admits it by his answer it will be decreed to be executed. If the plea stood alone, it would be good, but if the answer admits the parol agreement, the plea shall be overruled. *Cottingham v.*

Fletcher, 2 Atk. 155. A letter acknowledging a former verbal promise is sufficient. *Montague v. Maxwell*, 1 Str. 237. *A fortiori* an answer on oath to a former bill.

Mr. Youngs, contra. The statute is of no use if you compel the defendant to answer, and to admit the parol agreement. Jamesson's answer to the former bill cannot be produced in evidence. The warranty must be entered into at the time of the original contract. The answer, although it acknowledges the promise, relies on the Statute of Frauds to defeat it. The defendant was compelled to answer. The bill alleges that the goods were sold to Jamesson, but at his request were delivered to Brown. The bill demands a discovery how the defendant became bound and on what terms, and therefore the defendant was bound to answer as to the parol agreement. The answer does not waive the plea but relies thereon. By the statute the promise was void, not voidable. It can never be set up. An acknowledgment that such a void promise was made, will not make it a binding promise, when at the same time that he makes this acknowledgment he says he was never bound by it. The Court cannot dispense with the express words of the act. The Court are not left to say whether there is in fact any fraud, or any danger of perjury.

Mr. C. Lee, on the same side. If the defendant pleads the statute, it is a bar in equity; so if he insists upon it in his answer. *Whitchurch v. Bevis*, 2 Bro. Ch. Rep. 565. A court cannot dispense with the law, which is positive; but if the defendant will admit the parol agreement, and not insist on the statute, the Court will enforce the agreement. 1 Fonbl. 168.

Mr. Swann, in reply. There are cases within the words of the act, which are yet out of its purview and spirit; as a parol agreement, prevented by defendant from being put in writing; a parol agreement in part executed; a parol agreement confessed and the statute not insisted on. What right has the Court to decree the execution of these? Because there is no danger of perjury or fraud. 1 Powell on Contracts, 291, 309; *Lacon v. Mertins*, 3 Atk. 1, 3, S. C.; *Whitchurch v. Bevis*, 1 Harrison's Ch. Pr. 371, 372. The justice of this case is with plaintiffs, and ought to prevail unless stern law be against them. The weight of authorities is in their favor.

CRANCH, C. J., delivered the opinion of the Court.

This cause came on to be heard on the bill, answer, plea, and replication. The only facts on which a decree can be founded are those confessed by the answer to this bill or by the answer to a former bill, which is made an exhibit in the present bill. By the answer of the present defendant to a former bill of the complain-

ants against Mandeville & Jamesson, the defendant "admits that he gave a verbal promise to the complainants to pay them the amount of the goods if Brown should be unable to pay for them," but relies and insists on the Statute of Frauds in the same manner as if he had pleaded it. To the present bill the defendant pleads the statute, and then "not waiving his said plea but wholly relying and insisting thereon, says, he believes it may be true that the complainants sold the goods to Brown, and that the defendant verbally promised to pay for them if Brown should be unable;" and denies that he made any other promise; and denies that the goods were sold to himself, &c. And then says, "And this defendant again relying upon the statute to prevent frauds and perjuries, as aforesaid pleaded, to bar the complainants' demand against him for the supposed undertaking aforesaid, prays to be hence dismissed, &c." To this plea and answer there was a general replication and issue.

On the part of the complainants it is contended that if the parol agreement to pay the debt of another be confessed by the answer, although it relies on the Statute of Frauds, or although the statute be pleaded, yet the Court ought to decree a performance of the agreement, because there can be no danger of fraud or perjury, the prevention of which is the sole object and interest of the statute. It is also said that if a man confess in writing that he did make such a parol agreement; although at the time of such confession he insist that the parol agreement imposed no obligation on him, because the statute makes all such agreements void, yet the Court ought to decree its performance, because such confession takes the case out of the evil of the statute. The first case cited in support of these principles is *Cottington v. Fletcher*, 2 Atk. 155, where the plaintiff charged the defendant with holding a term as trustee for the plaintiff. The defendant pleaded the Statute of Fraud and Perjuries, alleging that there was no declaration of the trust in writing, but by his answer admitted the trust. Lord Chancellor Hardwicke was of opinion that the plea ought to be overruled, and said that if the plea stood by itself it might have been a sufficient plea, but coupled with the answer, which is a full admission of the facts, it must overrule the plea. In that case it does not appear that the defendant, in his answer, still insisted on his plea, and the benefit of the statute. His answer therefore might be considered as a waiver of his plea. But in the present case the defendant, conceiving himself obliged to answer, still takes the utmost care to guard against the confession being considered as a waiver of his plea or defence. If the defendant is obliged to answer and confess a parol agreement, there is no pos-

sible case in which a parol agreement can be vacated by that statute; unless the defendant will commit perjury by denying it. Instead therefore of preventing frauds and perjuries, the statute would tend to increase them; for by preventing the plaintiff from proving a parol agreement by any other evidence than the defendant's own oath, it holds out to the defendant the strongest temptation to perjury, and at the same time gives him a perfect security against detection. If the defendant is bound to confess the parol agreement it must be because when confessed he could not avail himself of the statute. But it is settled that he may avail himself of the statute. Hence it seems to follow that he is not bound to confess; for this would be to compel him to confess an immaterial fact. The question then occurs whether, if the defendant voluntarily confess the parol agreement, he can insist on the statute?

It is said in Mitford, 114, that if a plea is coupled with an answer to any part of the bill covered by the plea, the plea will, upon argument, be overruled; and he cites the case of *Cottingham v. Fletcher*, 2 Atk. 155; and in page 124 Mitford says an answer will overrule a plea. But cannot the defendant guard his answer so as to prevent it from having that effect? In the present case, if the answer overrules the plea, yet the answer itself sets up and insists on the same defence. And in Fonblanque, vol. 1, p. 171, note (d), it is said that it seems to be immaterial whether the defendant set up the defence in the shape of a plea or of an answer; the statute not having prescribed any mode in particular by which a defendant must avail himself of such defence. And he refers to the case of *Steward v. Careless*, cited in *Whitchurch v. Bevis*, 2 Bro. Ch. Rep. 566. The question then occurs, whether the statute is in equity, to be considered as a bar to the relief, or a bar to the discovery only. The words of the statute are "that no action shall be brought whereby to charge the defendant," &c. "unless the promise or agreement upon which such action shall be brought, shall be in writing," &c. The act refers evidently to the relief, and is at least as strongly expressed as if it had said that no action shall be maintained upon a parol promise, even if proved in any manner whatever. The confession therefore of a parol promise is not a confession of any cause of action either at law or in equity. A court of equity cannot, more than a court of law, dispense with the positive and clear prohibition of a statute.

There is no case, in which a court of equity has enforced such a parol agreement, when the confession was accompanied with a claim of indemnity under the statute. In *Cottingham v. Fletcher*, the plea was considered as superseded by the answer, which did

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not insist on the statute. It was therefore the case of an admission of the agreement without claiming the benefit of the statute.

The case of *Lacon v. Mertins*, 3 Atk. 3, has been cited, but the opinion of Lord Ch. Hardwicke, which is relied on, is only a *dictum* in a supposed case. He says, "If the bill had been brought by Mrs. Hayes, in her lifetime, and the defendant, Mertins, had admitted the agreement, though he had insisted on not performing it, the court would have decreed it, because the admission takes it out of the Statute of Fraud and Perjuries." He does not say, though he had insisted *on the statute*; but *on not performing it*, which is a different thing; and that he did not mean to say *on the statute*, is evident from the case which was then before him, in which the defendant confessed the agreement, and "offered to perform it."

The case of *Montacue v. Maxwell*, 1 Stra. 236, has also been cited, to prove that a parol promise, acknowledged afterwards in writing, is sufficient to take the case out of the statute. But the point does not appear in the case. The writing relied on, was not an acknowledgment of the parol promise simply, but a new promise in writing, to perform the parol promise, and this is evidently the ground on which the Chancellor overruled the plea, and ordered it to stand for an answer. The statute was not insisted on.

The opinion of Powell (Contracts, vol. 1, p. 291,) has also been cited. But that opinion is founded only upon authorities, in which the statute was not insisted upon; and in one of the cases which he cites, (*Croyston v. Baines*, Prec. Ch. 208,) the distinction is expressly taken between the case where a parol agreement is confessed, without insisting upon the statute, and a confession accompanied by a reliance on the statute.

There being, therefore, no case in which such a parol agreement, confessed, has been carried into execution, when the defendant has insisted on the statute, this Court will not say that it is not bound to obey the positive injunction of the statute, which forbids any action to be brought upon such an agreement. The bill must be dismissed with costs.

WIGGINS v. WIGGINS.

A deposition, taken more than six months after replication, in a chancery suit, cannot be read at the hearing, unless taken by consent, or by order of the Court, or out of the district.

BILL, answer, replication, and *dedimus* awarded in October,

Redfern v. Rumney.

1804. The cause was set for hearing in October, 1805. A deposition was taken in July, 1805.

Mr. Taylor objected, that the deposition being taken more than six months after the replication, could not be read as evidence on the hearing. See the Act of Assembly of Virginia, November 29, 1792, § 46, p. 67.

Mr. Swann, *contra* contended, that the Act of Assembly means six months after the cause is set for hearing.

Mr. C. Lee and *Mr. Simms* stated the practice to be as stated by *Mr. Swann*.

But the COURT said, that the words of the Act of Assembly, were too clear and positive to admit of a doubt, and this Court cannot say, that a practice, not sanctioned by any judicial decision, and in opposition to the express words of the act, is a correct practice.

M. & B. REDFERN v. RUMNEY *et al.*

A chancery attachment will not lie in Virginia, to charge the effects of a deceased foreign debtor in the hands of a resident defendant.

THE bill in this case sets forth — 1. That one, Joseph Hodgson, late of White Haven, in Great Britain, deceased, on the 29th of October, 1798, pretending to be in partnership with W. I. Hall, of Alexandria, purchased, for the partnership, goods to the amount of £500. 7s. 0d. sterling, and gave to the complainants a promissory note, dated at White Haven, on that day, for that amount, signed Hodgson & Hall. After the note was given, the complainants understood that Hodgson became a bankrupt in England, and afterwards died intestate, and no administration was taken out upon his estate. Hodgson resided in England, and Hall in Alexandria, and as the plaintiffs understood, carried on business on their joint account and profit: That the goods were purchased and shipped by Hodgson to Hall, and sold in Alexandria; many of the goods remained unsold at the time of Hodgson's death: That Hall denied the partnership: That after the bankruptcy of Hodgson, and before his death, some arrangement was made respecting his property, by which the defendant, Rumney, was authorized to settle his business in America, and to receive any debts, or effects which might belong to him there, and that in consequence of that authority, he collected and received effects and debts of Hodgson, which remained in Rumney's hands, in Alexandria, in the District of Columbia, at the time of the institution of this suit, and were received principally from Hall, for the purpose of paying debts due from Hodgson: That Rumney

did not think himself authorized, and refused to pay the complainants' claim, and they are apprehensive that he will remit the effects to Great Britain, and defeat the complainants of their remedy. It then prays discovery from Rumney, whether he did not receive from Hall, effects greatly beyond the complainants' claim, for the purpose of paying the debts of Hodgson; and, what was the amount of those effects, and whether they were in his possession, or subject to his power and direction, at the time of the institution of this suit. The relief prayed, is, that complainants' claim may be decreed to be paid out of those effects, and such other decree as may be consistent with equity.

Rumney's answer, does not expressly admit the debt to be due from Hodgson to the complainants, but says he thinks it probable. It states the complainants to have been always British subjects; that Hodgson was born a British subject, and resided in Great Britain at the time of contracting the debt to the complainants, and was declared a bankrupt, according to the British statutes; that Williamson & Birkett, of White Haven, were duly chosen and appointed assignees of the estate of Hodgson, and undertook the trust, and appointed the defendant their agent and attorney to settle and adjust the accounts and claims which existed in the United States, between persons resident therein and Hodgson, and to collect and receive what might be due to him, and to remit to the assignees what he should receive; that he has now in his hands \$617 collected from debts due to Hodgson, which he has been restrained by this suit from paying over to the assignees, but contends that as the complainants and Hodgson were British subjects at the time, &c., and the debt contracted in Great Britain, the complainants ought to be referred to assignees, and cannot avail themselves of the laws of this country, to gain an unequal share of the bankrupt's effects.

Upon this bill and answer, the cause was set for hearing, and was argued by *Mr. Swann*, for the plaintiffs, and *Mr. C. Lee*, for the defendants.

CRANCH, C. J., delivered the opinion of the Court. It has been argued as if the complainants had fully established their claim against Hodgson, and the Court will so consider it, although if it were questioned, it is doubtful whether that fact is sufficiently proved. The counsel for the complainants relies on the Act of Assembly of the 26th of December, 1792, (P. P. 114) "directing the method of proceeding in courts of equity against absent debtors, or other absent defendants, and for settling the proceedings on attachments against absconding debtors." But the complainants' bill is neither founded upon, nor supported by that act. It states no absent debtor, or absent defendant, but expressly states their

debtor, Hodgson, to have departed this life before the institution of this suit. Hodgson was no longer their debtor. Their debtor was either the assignee under the bankrupt laws, or the executor or administrator of Hodgson.

There is, however, one ground of equity against Rumney, stated in the bill, and that is, that he received from Hall effects in trust to pay the debts of Hodgson; but this ground is denied by Rumney's answer, which states that what he received, he received as agent for the assignees, and to be remitted to them. This the complainants have admitted to be a sufficient answer, by not excepting to it for insufficiency; but if it is not, then the averment in the bill stands unanswered by the defendant, and not proved by complainants; it cannot, therefore, be the foundation of a decree. If it should be said that Rumney should be charged as executor in his own wrong, the answer is, that that is a ground of relief at law, and not in equity, and there is no allegation in the bill to charge him as such.

There being, therefore, no ground of equity admitted or proved, it becomes unnecessary to decide the point on which the cause was argued. The question argued at the bar was, "whether the effects of an English bankrupt in this country are transferred by the assignment; or whether the Act of Assembly prevents the operation of that assignment in this country." The authorities cited on that point, were, *Chevalier v. Lynch*, Doug. 170; *Hunter v. Potts*, 4 T. R. 182; *Sill v. Worswick*, 1 H. Bl. 665; *Phillips v. Hunter*, 2 H. Bl. 402; Cooper's Bankrupt Law, 328; *Harris v. Mandeville*, 2 Dallas, 256. It is sufficient as to that point to say, that the counsel for the complainants rested his whole claim upon an Act of Assembly, which does not in any manner apply to their case.

The bill, therefore, must be dismissed with costs.

CHAPMAN & WISE v. SCOTT.

The absence of a witness at the trial at law, is no ground of equity to obtain an injunction to stay proceedings at law on the judgment.

INJUNCTION to stay a judgment at law.

CRANCH, C. J., delivered the opinion of the Court. The simple and only ground of equity stated in the bill is, that the complainant had a good defence at law, and duly summoned his father as a witness to prove it, ("which will appear from the annexed summons.") But that when the cause came on to trial, the complain-

Wright v. West's Executrix.

ant's father was so much indisposed, that he could not, in time, attend as a witness for the complainant, and judgment was obtained at law against him. The summons was served not by a marshal or other officer, but by the son of the witness. The answer denies the ground of defence at law, but does not say any thing of the absence of the witness at the trial. If, therefore, the equity of the bill is sufficient to warrant an injunction, it cannot be dissolved. The mere fact of the absence of a material witness at the time of trial, is not of itself a sufficient ground for an injunction, because the court of law who tried the cause, was fully competent to give relief, by a continuance or a new trial. The bill does not even aver that an application was made to the court of law for that relief; and if it had, and the court had erroneously refused it, or had improperly exercised its discretion in refusing it, it is not competent for a court of equity to revise and correct the errors of a court of law in a case in which the latter had complete jurisdiction, equitable as well as legal.

There being therefore, no ground of equity in the bill, the injunction must be dissolved.

WRIGHT v. WEST'S EXECUTRIX.

A devise of lands, "after payment of debts," subjects the land to the payment of the debts.

Where a clerk certifies the mayor, it is not necessary that the mayor should certify the clerk.

BILL IN EQUITY for the sale of real estate to pay debts. The words of the will were, "I give the whole of what I may be possessed of, at my decease, and after my debts are paid, to Mrs. West."

The plaintiff's claim was for a balance due for work and labor.

Mr. E. J. Lee, for the defendant, demurred to the bill, because it did not state that the plaintiff could not establish his debt at law, nor that he could not prove the amount of assets at law. If the will makes the real estate assets, the executrix is bound to return them in the inventory.

Demurrer overruled.

The defendant then offered an answer, sworn before an alderman of Richmond, who was *ex officio* a justice of the peace. Rev. Code, 72. The alderman was certified by the Mayor of Richmond, who was certified by the clerk of the Court of Hustings.

 Ramsay v. Wilson.

Mr. Taylor, for the plaintiff, objected to the answer, because the mayor had not certified the clerk of the Court of Hustings.

But the COURT overruled the objection, upon consideration of the case of *Potts v. Ghequiere*, in this Court in March, 1805, not reported.

McCULLOCH v. McLAIN'S EXECUTORS.

The words, "I will, in the first place, that my just debts be paid," charge the real estate with the payment of the debts.

BILL IN EQUITY to charge real estate with the payment of debts. The words of the will were, "I will, in the first place, that my just debts be paid by my executors." The testator then devises all his estate, real and personal, to trustees, and makes them executors. The authorities cited for the complainant were: 1 Eq. Ca. Ab. 198; 2 Id. 371, 372; and *Trott et al. v. Vernon*, 2 Vern. 708.

The COURT decreed a sale of the real estate.

WILSON, Executor, v. BASTABLE.

Equity will not relieve against a judgment at law, upon *plene administravit*, on the ground that the defendant at law could not produce vouchers to support his plea, unless there be in the bill an allegation of fraud, mistake, surprise, or accident.

MOTION to dissolve an injunction, to stay proceedings at law upon a judgment rendered on the issue of *plene administravit*. The only equity stated in the bill was, that the defendant at law could not support his plea for want of vouchers. No fraud, mistake, accident, or surprise, was alleged.

Mr. E. J. Lee cited the case of *Wilson v. Bell*, 2 Call, 104; *Dunlop v. Shelton*, before Chief Justice Marshall; *Robinson v. Bell*, 2 Vern. 146; and *Stephenson v. Wilson*, 2 Vern. 325.

Mr. Swann, for the defendant, cited *White v. Bannister's Executors*, 1 Wash. 168.

Injunction dissolved.

PATRICK RAMSAY v. WILSON et al.

Notice of motion to dissolve an injunction, given on the first day of the term, is notice of a motion to be made at the next term.

BILL FOR INJUNCTION. Injunction granted out of court.

The defendant's answer was filed on the first day of this term, (25th November, 1805,) and indorsed "notice to dissolve."

 Roberdeau v. Roberdeau.

Mr. E. J. Lee, for the defendants, now (May, 10, 1806, being November term adjourned,) moved to dissolve.

The COURT stopped him, and said the notice was not to this, but to the next term, and refused to hear it now.

 LADD v. WILSON.

The Court will not, in general, suffer the affidavits of jurymen to be read, upon a motion for new trial, on the ground of mistake, miscalculation, or misconduct of the jury.

VERDICT for the plaintiff.

Motion by the defendant for a new trial, grounded on the affidavits of three or four of the jurymen, that a mistake was made by the foreman in calculating upon the principles agreed on by the jury; some of the others, particularly the foreman, believed there was no mistake.

Mr. Swann, for the plaintiff, cited *Vasie v. Delaval*, 1 T. R. 11, and *Cochran v. Street*, 1 Wash. 79.

The COURT were of opinion, that it was dangerous to take the affidavits of jurors as to mistakes of calculations, &c.; but on reading the affidavits, there did not appear to have been an error in the foreman's calculation, and a new trial was refused. The Court, however, wished it not to be considered as giving a sanction to the practice of taking such affidavits of jurymen.

 ROBERDEAU v. ROBERDEAU.

The testator having bequeathed a certain annual allowance to his three younger children, to be paid out of the rents of his real estate, and having by his will disposed of all his property except the reversion of certain land, directs his executors, in case the rents should not be sufficient to pay the allowance, to adopt some mode for raising the deficiency out of the other parts of the estate not devised to his wife: *Held*, that the executors had, thereby, power to sell the reversion of the lands. The widow is to bear her proportion of the executors' commissions.

THE opinion of the Court was delivered by CRANCH, C. J.

The questions submitted to the Court in this case, and upon which it is necessary to decide, before a final decree can be made with propriety, are, 1. Is the real estate of the testator liable to the payment of the annuities given by the will to the three younger children? 2. Whether the executors' commissions are to be a charge against the general estate, so as eventually to form a charge against the *residuum* after payment of the debts, specific

legacies, and the widow's dower and thirds, or whether the specific legacies and dower are to bear their proportion of that expense.

1. Whether the real estate is liable for the annuities to the younger children. This question depends upon the construction of the will. The testator first directs his debts to be paid, and for that purpose empowers his executors to sell Pennsylvania lands on the waters of the Ohio, his shares in the Potomac Company, and his unimproved ground below the bank, in the town of Alexandria.

He then bequeathes to his wife his household and kitchen furniture, and devises to her, for life, his dwelling-house and lot, and by a codicil, a child's share in fee-simple in the *residuum* of his real estate. The will then proceeds in these words :—

“Item. I do order and direct, that my executors do, out of the rents of my estate, allot and appropriate the sum of £70, annually, to each of my three younger children, namely, Jane, James, and Harriet, for their education and maintenance, which sums are to be respectively paid unto Jane and Harriet, until they arrive to the age of eighteen, and unto James until he arrives at the age of twenty-one years; and as my said children severally attain the age aforesaid, I direct that the aforesaid annual allowance of £70 shall cease.

“And I do further direct, that if the rent at present arising from my estate, shall not, from any accident, be sufficient to answer the aforesaid allowance to my three children before mentioned, that my executors do adopt some mode for raising any deficiency, out of the other parts of my estate not hereby devised to my said wife.

“Item. I give and devise all the rest of my real estate, not hereby in any manner before appropriated, unto my several children, Isaac, Ann, Mary, Selena, Jane, James, and Harriet, and to their heirs and assigns, to be equally divided among them.”

The testator then devises the reversion of the house and lot before devised to his wife for life, to his children, in fee, to be equally divided, &c.

“Item. I give and devise to my said children, and to their heirs and assigns forever, to be equally divided between them, those parts of my said estate which have been hereby appropriated for raising the sums of money hereby directed to be appropriated for the education and support of my three younger children, namely, Jane, James, and Harriet, the said division to be made as those sums shall respectively cease to be paid.”

He then authorizes his executors to lease out the property devised to his wife, during her life, and pay the rents to her; and also to grant on ground-rent forever, during the minority of Jane,

James, and Harriet, such part of his unimproved grounds as, upon a division of his estate, should be allotted to them, reserving the rent to the child whose ground should be so granted. He then appoints his wife guardian of his three younger children, and nominates her and Colonel Simms his executors.

By a codicil, reciting that the rents of his lands granted to John Fitzgerald, and of a warehouse demised to Abraham Morehouse & Co., would amount to a greater annual sum than that which by his will he had appropriated to the education and maintenance of his younger children, he directs the surplus of those rents to be appropriated to the payment of his debts, and nominates Alexander Smith, executor, with the two others. Mr. Smith alone qualified as executor, and the widow renounced her right under the will, and betook herself to her dower and thirds.

The testator seems to have been persuaded that the rents of a part of his real estate would have been sufficient to raise the annuities as they should become payable; and in that case, and under that impression, he directed his executors to allot and appropriate a certain part of the rents for that purpose, intending thereby, as appears from the subsequent expressions of the will, that his executors should designate what part of his estate should stand specifically charged with those annuities, and that the residue of his estate (except what he had devised for payment of his debts, and also except what he had devised to his wife,) should be immediately divided, during the minority of his younger children. And that those parts of his estate which should have been allotted and appropriated by his executors to answer the annuities should be divided as the annuities respectively ceased. The whole of this arrangement depended upon the event that a part only of the rents of his real estate would have been sufficient to raise the annuities.

But he also contemplated and provided against the possibility of a different state of things, viz., that the rents of all his real estate (not devised to his wife and not devised for the payment of his debts) might not be sufficient to raise the annuities for the younger children. In this event he declared his will to be that his executors should adopt some mode for raising any deficiency out of the other parts of his estate not devised to his wife, giving them thereby an unlimited authority, and demonstrating his intention to be, that the annuities should be paid at all events, and that the deficiency should be raised out of the other parts of his estate not devised to his wife. Words cannot be stronger to show an intention to charge such other parts of his estate with the payment of such deficiency. The question arises, what other parts? Other than what? Other than the rents of his estate not devised

to his wife; for the case contemplated all those rents to be exhausted. These other parts could not be the household and kitchen furniture, for they were specifically bequeathed to his wife, and he has excepted them from the burden of the annuities. It could not mean the personal estate, because that was the proper fund for the payment of his debts, and was contemplated by him as insufficient for that purpose, as appears by his devising certain parts of his real estate for the payment of debts, in aid of his personal estate. The parts of his estate, other than the rents of his estate, must therefore have been the land itself, the fee-simple, the reversion. A power to raise the deficiency out of the land itself or out of the fee-simple, or out of the reversion, must have been a power to mortgage, or to sell.

It does not appear in this cause, that at any time since the testator's death, the rents of his estate, clear of his wife's prior claim, have been sufficient to answer the annuities. If the fact is that they have not been sufficient, then all those provisions of the will which were predicated upon their sufficiency, failed of effect; and the other provisions of the will, which were predicated upon the insufficiency of the rents, came into operation.

It appears, by the account taken by the commissioners under the order of this Court, that the rents of the estate, (clear of the widow's claim,) received by the executors, have proved insufficient to answer the annuities; and there is no fraud or negligence charged upon the executor. Fraud or negligence are not to be presumed without evidence. If the insufficiency happened neither by fraud nor negligence, it must have been by accident.

The Court, therefore, must consider the case to be that the rents of the testator's estate were, by accident, not sufficient to answer the annuities, in which case, as has been before stated, the executors had the power to raise the deficiency, by sale or mortgage of the reversion of the estate or of some part of it. They have not done so, and the residuary legatees among whom the division has been made, derive the whole benefit of the estate, which the executors might have sold or mortgaged. They have gained, therefore, what the younger children (the specific legatees) have lost; contrary to the maxim in equity, *Nemo debet locupletari alienâ jacturâ*.

The true construction of the will is, that, in the first place, the rents of the estate, clear of the widow's claim, were to be applied to the discharge of the annuities, and if the rents should not be sufficient, the reversion was liable.

The order of priority of the several parties having claims upon the testator's real estate under the will, is this: 1. First, the widow, who could not be deprived of her dower without her con-

sent. 2. The creditors, so far as the real estate is, by the will, subjected to the payment of debts. 3. The specific legatees (the annuitants.) 4. The residuary legatees (the seven children.)

There is no foundation for the idea that the annuity of either of the younger children is to cease upon a division of the estate during their minority. They are not bound to divide upon such terms; perhaps no division, during their minority, can absolutely bind them; but at all events the Court is bound to see that such division shall not prejudice their rights. The division can only go to the satisfaction of so much of their annuities as is chargeable upon that portion of the estate which is allotted to them upon the division.

Upon the whole, therefore, the Court is clearly of opinion that the deficiency, after applying the rents of the estate (clear of the widow's claim) towards the discharge of the annuities, is a charge upon the real estate, the land itself, and must be accounted for in equal proportions by the seven children, among whom that estate has been divided.

On the second point the Court is of opinion, that the widow ought to pay her proportion of the executors' commissions.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1806, AT WASHINGTON.¹

UNITED STATES *v.* SAMUEL MYERS.

It is an assault to double the fist and run it at another, saying, "If you say so again I will knock you down."

PRESENTMENT, for an assault on Jane McGrath. The evidence was that the defendant doubled his fist and ran it towards the witness, saying, "If you say so again I will knock you down."

Mr. Key, for the defendant, contended that it was not an assault. The words explain the act, and show the intention not to be to commit a battery. It was like the case of the man putting his hand on his sword, and saying, if it were not term time or assizes, I would kill you, &c.; and he moved the Court to instruct the jury that it was no assault.

Mr. Jones, Attorney for the United States, *contrà*.

The COURT, (*nem. con.*) refused to give the instruction.

Verdict, guilty. Fined five dollars.

UNITED STATES *v.* RICHARD PIGNEL.

It is not necessary that a peace-officer should have a warrant to suppress an affray.

PRESENTMENT, for opposing Clement Venable, a constable, in the execution of his duty; it having been proved that Venable had a warrant against the defendant.

Mr. Law, for the defendant, moved that the warrant should be produced, and to instruct the jury to that effect.

¹ Time of session of the Court changed. See Act of Congress of April 21, 1806, chapter 36. [2 Stat. at Large, 390.]

Smith v. Watson.

Mr. Jones, contra. It is not necessary to produce the warrant. Venable took the man in an affray, and had a right to do so as a peace-officer.

The COURT, (*nem. con.*) instructed the jury that if they should be of opinion, from the evidence, that Venable, the constable, was in the general execution of his office as a conservator of the peace, and as such endeavoring to suppress the affray, then it is not necessary to produce the warrant spoken of by the witness. But if the jury should be of opinion that he was only endeavoring to execute the warrant, then the warrant must be produced, or its non-production satisfactorily accounted for.

R. PETER v. JOHN SUTER.

Upon surrender of the debtor upon a *ca. sa.* the Court will not, without motion, order him to be committed in execution.

JUDGMENT, at December, 1804. *Ca. sa.* issued and sent to D. Peter, returnable to this term. The principal surrendered in discharge of his bail.

Mr. Mason, for the plaintiff, was absent; no notice had been given.

The COURT received the surrender of the debtor, and refused to order him into commitment, the plaintiff not having prayed it.

Mr. Caldwell then appeared for plaintiff, and prayed him in commitment, and he was committed.

SMITH *et al.* v. JOHN F. WATSON.

An affidavit to hold to bail must be positive.

MOTION by *Mr. Caldwell*, for the defendant to appear without bail. The cause of action was an account and affidavit by one of the plaintiffs, that the above account, as stated, is "true and correct, according to the best of his knowledge and belief." 1 Sel. Prac. 112.

PER CURIAM. The affidavit is not sufficient to hold to bail. It is not such as would support a prosecution for perjury. In general the Court will rule bail upon the production of any written instrument purporting to be signed or sealed by the defendant, whereby he promises or obliges himself to pay a certain sum of money or quantity of tobacco, without an affidavit. In other general cases they will require an affidavit stating a certain sum

United States v. Wary.

due for the debt or damages, or that damages have been sustained to some certain amount ; and if the cause of action arise upon an open account, the affidavit ought to be at least as certain and positive as that which the Act of Assembly of Maryland, 1729, c. 20, § 9, requires to make the account evidence in cases where the dealings do not exceed £10 in one year. See *Grayham v. Konkapot*, [post, 313.]

UNITED STATES v. M. KENNEDY.

An indictment will not lie for forestalling the Georgetown market contrary to the by-law.

INDICTMENT for forestalling Georgetown market contrary to by-law of Georgetown.

Verdict, guilty.

By the by-law, the penalty is ten dollars and to "be recoverable as in cases of small debts by warrant, one half to the clerk of the market, the other to the use of the corporation."

Judgment arrested. FITZHUGH, J., absent.

UNITED STATES v. WILLIAM LAMBELL.

Parol evidence may be given of the contents of a lost warrant.

INDICTMENT for opposing Clement Venable, in the execution of his duty as a constable.

Mr. F. S. Key, objected to parol testimony of the warrant being given, because it is matter of record. Peake's L. E. 19.

The COURT permitted the contents of the warrant to be proved by parol, after the magistrate had sworn that he had searched every part of his house where it was probable to find it and could not ; and that he believed it was lost or destroyed ; that he had not seen it since the officer returned it to him.

Verdict, guilty ; fined thirty dollars.

UNITED STATES v. WILLIAM WARY.

Parol evidence of the contents of a warrant cannot be given unless the loss of the warrant be proved.

INDICTMENT for resisting Clement Venable in the execution of

Grayham v. Konkapot.

his duty as a constable; in serving a warrant from Samuel N. Smallwood, a justice of the peace. The justice swore that he had searched the papers among which it was probable that the warrant would be filed, but if he had had more time to search he thought it probable it could be found.

The COURT thought this not sufficient to admit parol evidence of its contents, and refused to wait while the witness should make further search, it being Saturday, half past two o'clock, P. M., and the witness' office being more than a mile distant.

Verdict, not guilty.

WILLIAM P. TIBBS AND THOMAS BLANC v. PARROTT.

In an action for goods sold by Tibbs & Company, the plaintiffs must prove themselves to be the firm of Tibbs & Company.

ASSUMPSIT for goods sold and delivered. On the trial of he issue of *non assumpsit*, *Mr. Mason*, for the defendant, moved the Court to instruct the jury that they must be satisfied that the contract was made with the plaintiffs, William P. Tibbs and Thomas Blanc. The deposition of the only witness on the part of the plaintiffs, says the goods were sold for and on account of William P. Tibbs and Company.

Mr. Jones, for the plaintiffs, contended that it is not necessary for the plaintiffs to prove themselves to be partners, unless upon a plea in abatement.

The COURT stopped *Mr. Mason* in reply, and said the law is too plain to require further argument. The plaintiffs must satisfy the jury that the contract was made between the plaintiffs and defendants. The deposition having only stated that the goods were sold by William P. Tibbs & Company, the jury must be satisfied by evidence that the house of William P. Tibbs & Company, consists of the plaintiffs, William P. Tibbs and Thomas Blanc. The plaintiffs took a bill of exceptions.

Verdict for defendant. New trial granted, on the ground of surprise, that the Court should require such evidence. See the case of *Woodward & Co. v. Sutton & Mandeville*, at Alexandria, November term, 1806.

GRAYHAM v. KONKAPOT.

An affidavit in the form of that required by the Act of Maryland, of 1729, is sufficient to hold the defendant to bail.

Mr. Jones, for the defendant, moved to reconsider the order for

Tenny v. Densley & Burford.

ruling him to bail. The words of the affidavit are the same as those required by the Act of 1729, and therefore within the rule of the Court. The Court were also moved to reconsider the case of *Smith et al. v. Watson*, [ante, 311,] which they did, and unanimously affirmed the former decision.

UNITED STATES v. CASPAR WAGNER.

It is not felony to steal rails fixed into posts inserted in the ground, if the severance of the rails from the posts and the taking and carrying away were one continued act.

INDICTMENT for stealing three fence-rails, the property of some person or persons to the jury unknown.

Mr. Law, for the prisoner, contended that the fence was part of the freehold, and therefore the defendant was only guilty of a trespass.

PER CURIAM. If the jury should be satisfied, from the evidence, that the rails were fixed in the posts for the purpose of making a fence, and the posts were fixed in the ground, and that the prisoner severed them from the posts and took them away at the same time as one continued act, the prisoner was not guilty of felony but only of a simple trespass.

Verdict, not guilty.

TENNY v. DENSLEY & BURFORD.

An insolvent debtor will be discharged from arrest for costs accrued partly before and partly after his discharge under the act.

CA. SA. for costs on verdict at December term, 1805, for defendant, Tenny. On the 30th of September, 1805, Densley had been discharged under the Insolvent Law of 1803, [2 Stat. at Large, 237,] by the 10th section of which, he is to be discharged if taken on any process or any judgment for any debt, damages, or costs contracted, owing or growing due before his discharge. Part of these costs were growing due or were contracted before his discharge. The defendant, Densley, was discharged by the COURT on that ground. (DUCKETT, J., absent.)

Wilson v. Harbaugh.

UNITED STATES v. ELIZABETH SHORTER.

The wife of him whose goods are stolen is not a competent witness for the prosecution unless the husband has released to the United States his share of the fine.

INDICTMENT for stealing a gold ring and a pair of shoes, the property of Samuel Long. Phœbe Long, his wife, was called as a witness on the part of the United States.

Mr. Caldwell, for the prisoner, objected to her being sworn, because of the interest of her husband in the one half of the fine.

The COURT (DUCKETT, J., absent,) said she was not a competent witness, without a release by her husband, of his right to the fine. Verdict, guilty.

NEGRO MOSES v. PATRICK DUNNAHO.

A petitioner for freedom has not a right to go in search of his witnesses.

PETITION for freedom.

Mr. Caldwell, for the petitioner, moved the Court for leave to the petitioner to go in search of evidence in support of his petition.

Refused. The COURT said they knew no law which authorized them to give such leave. The usual recognizance is to permit the petitioner to attend court from time to time.

WILSON v. HARBAUGH.

In case of the death of a plaintiff, the filing of letters of administration by his administrator is such a proceeding in the case before the tenth day of the second court, as will justify the Court in retaining cognizance of the cause, under the Act of 1785, c. 80, § 1.

THE plaintiff's death was suggested, July, 1805.

Mr. Morsell, for the defendant, then objected that the appearance of the executor was not entered within the first ten days of this term, and relied on the Acts of Assembly, 1785, c. 80, § 1, and 1787, c. 9, § 7. The Act of 1785, says, if there be no appearance or other proceeding before the tenth day of the second court, &c., the action shall be struck off.

Mr. Van Horne. The plaintiff's letters of administration were filed on the 7th day of this term. This is a "proceeding." The words of the Act of 1787, "where new parties are to be made," gives a further time. The Act of 1785, meant to give a year.

Mr. Morsell, in reply. The word "proceeding," in the Act of 1785, applies only to the case of the death of the defendant. The words "to be made" in the Act of 1787, are only applicable to cases happening after the passage of that act.

The Court was of opinion that the filing of the letters of administration was such a proceeding in the case before the tenth day of the second court, as justified the Court in retaining cognizance of the cause.

NEGRO WILLIAM FOSTER v. WILLIAM SIMMONS.

An importation of a slave from the county of Alexandria, into the county of Washington, is an importation into the State of Maryland, within the meaning of the Act of 1796, c. 67, as adopted by Congress on the twenty-seventh of February, 1801.

PETITION for freedom on the ground that the petitioner was born and on the 27th of February, 1801, resided in that part of the District of Columbia, which was ceded by Virginia to the United States, with Mr. Chapman, his owner, who sold him to Mr. Payne, who sold him to the defendant in Washington county, in this district, and sent him to the defendant, from the county of Alexandria, into this county. By the Act of Congress of the 27th of February, 1801, [2 Stat. at Large, 103,] it is enacted that the laws of Maryland, as they then existed, should continue in force in that part of the district which was ceded by that State. And the Act of Maryland, 1796, c. 67, was then in force, by which it is enacted "that it shall not be lawful to import or bring into this State, by land or water any negro, mulatto, or other slave for sale or to reside in this State; and any person brought into this State as a slave contrary to this act, if a slave before, shall thereupon cease to be the property of the person so importing, &c., and shall be free."

Mr. Caldwell, for the defendant, moved the Court to instruct the jury, that if they should find that on the twenty-seventh of February, eighteen hundred and one, the petitioner resided with, or under the authority of his master in Alexandria, his master had a right to send him into the county of Washington, and the petitioner did not thereby gain his freedom.

Mr. Mason, on the same side, contended that all locality as States ceased as to the two parts of the district at the time of the transfer of jurisdiction by the two States to the United States. That a law for the forfeiture of property ought to be construed strictly in favor of the property in the master. That neither the letter nor spirit of the Act of Maryland has been violated. That the defendant has not brought a slave into the State of Maryland.

Mr. Jones and *Mr. Hiort*, for the petitioner, contended, that as the law in Washington county was to continue as it was before the twenty-seventh of February, eighteen hundred and one, and as the law before that day, in the county of Washington, was, that no slave could be lawfully imported into that county, the law is the same yet, and that a bringing from Alexandria county to Washington is the same as from Virginia to Maryland. If this adopted law is to be construed so strictly, there is no limitation to importation of slaves, even directly from Africa. The Act of Congress of the third of May, 1802, c. 52, § 7, [2 Stat. at Large, 193,] only authorizes slaves to be brought from Virginia and Maryland into the district as they might before the twenty-seventh of February, 1801. That is, Virginia slaves may be brought into Alexandria county, and Maryland slaves into Washington county, but it does not authorize the bringing of slaves from Virginia into Maryland, nor from Maryland into Virginia. Lacy carried Lee's slaves from Alexandria to Georgetown, and the Court decided it was a carrying out of the State of Virginia, within the meaning of the Act of Assembly of Virginia of the 25th of January, 1798, § 6 and 7, p. 374.

The COURT (*nem. con.*) refused the instruction, saying that they must take the whole act, or no part of it. If this construction be not given to the statute, there is no law to prevent the importation of slaves into the District of Columbia. It was the intention of Congress to continue in force in this part of the district all the laws as they then existed.

UNITED STATES v. FREDERICK HUNTER.

A confession made under the impulse of threats or of promises of favor, is not evidence. But facts discovered in consequence of such confession are evidence. Satisfaction to the owner of the goods stolen, is admissible, but if made merely to avoid the inconvenience of imprisonment, and not under a consciousness of guilt, it is not evidence against the prisoner.

INDICTMENT for larceny.

Mr. W. H. Dorsey, for the prisoner, prayed the Court to instruct the jury, that if the prisoner's confession was made after threats, &c., or promises of favor, then neither the confession, nor the making satisfaction to the owner, is competent evidence against the prisoner in this prosecution.

Mr. Jones, Attorney for the United States, contended, that if the confession be corroborated by any facts discovered in consequence of the confession, the confession itself may go in evidence.

The COURT gave the following instruction, namely: If the jury

The Mayor and Council of the City of Washington v. Wheaton.

should be satisfied, by the evidence, that the confession of the prisoner was made under the impulse of threats or of promises of favor, such confession is not evidence. But that any facts discovered in consequence of such confession, which facts would in themselves be evidence against the prisoner, are still good evidence, notwithstanding they were discovered by means of the confession. That the fact of payment, or satisfaction to the owner of the things stolen, is a fact admissible in evidence to the jury; but if the jury should believe the payment or satisfaction was made merely to avoid the inconvenience of imprisonment or of a trial, and not under a consciousness of having committed the offence, it is not evidence against the prisoner.

Verdict, guilty, and sentenced to be fined ten dollars, and whipped ten stripes.

UNITED STATES v. NEGRESS TERRY, a Free Woman.

Slaves are competent witnesses for free negroes indicted for assault and battery.

INDICTMENT for assault and battery on Mr. Foxon. A slave was offered as witness for the traverser.

Mr. Jones, Attorney for United States, objected. By the Maryland law of 1717, c. 13, § 2, "no slave shall be received as evidence in any cause wherein any christian white person is concerned."

The COURT permitted the slave to be sworn.

Verdict, not guilty.

THE MAYOR AND COUNCIL OF THE CITY OF WASHINGTON v.
WHEATON.

The corporation of Washington had authority under the charter of 1802, § 7, to pass a by-law to regulate and license hackney-coaches.

APPEAL from the judgment of William Thornton, a justice of the peace, in an action of debt for penalty of the by-law, for running hacks without license, contrary to the by-law, c. 9.

The COURT instructed the jury that the corporation had a right and power under their charter of 3d May, 1802, § 7, [2 Stat. at Large, 197,] to make such a by-law, and that it was necessary for the defendant to show an actual license.

STEPHENSON V. GIBERSON.

Upon an attachment under the Act of 1795, c. 56, the plaintiff must prove his debt before he can obtain judgment of condemnation.

Quære, whether attachment lies for unliquidated damages.

ATTACHMENT under the Act of Maryland of 1795, c. 56.

The plaintiff made affidavit and annexed articles of agreement by which the defendant had agreed to do bricklaying work for the plaintiff.

The COURT refused to condemn the attached effects without proof of the debt, and doubted whether a claim of unliquidated damages can be the ground of an attachment under the Act of 1795.

BIRCH & SMALL v. BUTLER.

In order to obtain an attachment under the Act of Maryland of 1795, c. 56, it is not necessary that all the plaintiffs should make the affidavit, nor that it should appear that they were citizens of the United States.

The writ of attachment and the *capias* may be amended by inserting the christian names of the plaintiffs, by the leave of the Court, before condemnation.

ATTACHMENT under the Act of Maryland of 1795, c. 56.

Mr. Morsell and *Mr. Dorsey*, 1. Objected that the oath was made by Small only. 2. That the christian names of Birch & Small are not mentioned, either in the writ of *capias*, or of attachment, nor in the affidavit. 3. That it must appear on the papers that the plaintiffs were citizens of the United States. The act was made for a certain class of people, for citizens of the United States only. If an insolvent law applies only to citizens of Maryland, it must be shown that they are citizens.

The COURT stopped *Mr. F. S. Key* as to the 1st objection.

Mr. F. S. Key. As to 2d, the omission of the christian name does not affect the merits. This objection would not prevail on a motion in arrest of judgment. It could only be taken advantage of by a special demurrer. The Court refused to quash the attachment and suffered the plaintiff to amend the *capias* and attachment, by inserting the christian names. They did not think it necessary that the plaintiffs should aver themselves to be citizens of the United States.

CIRCUIT COURT OF THE UNITED STATES.

JULY TERM, 1806, AT ALEXANDRIA.

AMBLER v. McMECHEN.

It is not necessary that a forthcoming bond should recite the return of the execution, nor the certificate of the service, nor the name of the person by whom it was served; but it must state that the execution was served.

A mistake in calculating the marshal's fees may be cured by a release; and judgment may be rendered for the true sum.

CRANCH, C. J., delivered the opinion of the Court. This is a motion for an execution on a forthcoming bond, dated November 18th, 1799, which recites the amount of the execution on the judgment to be four hundred and sixteen dollars and sixty cents, including all legal costs attending the execution. The defendant opposes the award of execution on this bond. 1. Because it does not recite the service of the former execution, and, 2. Because it does not recite the amount due thereon.

The words of the Act of Assembly (p. 298, § 13,) are "a bond from such debtor and securities, payable to the creditor, reciting the service of such execution, and the amount of the money or tobacco due thereon, and with condition to have the goods and chattels forthcoming at the day of sale appointed by such sheriff or officer." And such a bond, when returned, is to have the force of a judgment; and thereupon the Court, on motion, may award execution for the money and tobacco therein mentioned, with interest from the date of the bond, and costs.

The defendant produces the execution upon which the bond was taken, which appears to be for

				\$372.05
		Costs,		{ 18.06
				{ 8.20
				<u>398.51</u>
Marshal's com's	5 per cent. on \$300.00	\$15.00		
	2 per cent. on 98.51	1.97	16.97	
Service,			63	
				<u>\$416.11</u>

The error of 49 cents, is the difference between 2 and $2\frac{1}{2}$ per cent. on 98.51. The bond recites the service of the execution to

have been made by James Campbell, deputy town-sergeant, whereas the execution appears to have been returned by C. Turner, the town-sergeant himself. In consequence of this variance, it is contended by the defendant's counsel, that the service of the execution is not recited in the bond. Upon this point, the COURT is of opinion, that the return by the principal sergeant is not conclusive evidence that the service was not made by Campbell, his deputy, as alleged in the bond.

The Act of Assembly which has been cited, (p. 123, § 26,) and which requires the deputy to indorse his name as well as that of his principal, on the writ which he has served, does not make void the service if the deputy should fail to indorse his name on the writ. It only subjects him to a penalty; and the object of the law was to prevent disputes between sheriffs and their deputies.

The act respecting the forthcoming bond, does not require that it should recite the return of the execution, nor the certificate of the service, nor the name of the person by whom the service was made; but it must recite the service of the execution; that is, as the Court understands it, the bond shall aver that the execution has been served. This has been done, and therefore the Court thinks the bond has satisfied the words and spirit of the act in this respect.

As to the other objection, that the amount due on the execution is not recited, because the sum stated in the bond includes the marshal's commissions, which are miscalculated, and are stated to be forty-nine cents too much, the Court, at a former argument of the case, intimated to the counsel for the defendant, that the point was probably settled in the cases of *Scott v. Hornsby*, 1 Call, 41, and the three following: *Bell v. Marr*, 1 Call, 47; *Worsham v. Egleston*, 1 Call, 48, and *Wilkinson v. McLochlin*, 1 Call, 49; and that, unless a distinction could be taken between this case and the principle on which those cases were decided, their authority was decisive. An attempt has been made to point out a difference. It is said that in the cases in Call's Reports, the amount due upon the execution was in every instance truly stated, but the bond contained an additional sum separate from the amount due on the execution; that the error existed in this separate sum; and that the bond contained in itself the data by which the amount really due upon the execution might be ascertained and the bond itself corrected. But upon an examination of those cases the Court does not find the fact to be so.

In the case of *Scott v. Hornsby*, the sheriff took the bond, including his commissions. It does not appear that the amount of the commissions was stated in the bond. It rather seems, from the report of the case, that the principal, costs, and commissions were

stated in an aggregate sum. Yet, the plaintiff having released those commissions, the court awarded execution for the residue.

In the case of *Bell v. Marr*, 1 Call, 47, the forthcoming bond exceeded the amount of the execution by the sum of £23. 6s. 7½d. Execution was awarded on the bond for the whole sum, and three days afterwards the plaintiff released the excess on record, and the judgment was affirmed on writ of error. Here it is not stated whether the £23. 6s. 7½d. was part of a whole sum, or whether it formed a separate item in the execution; but the former seems the most probable conjecture.

In *Worsham v. Eggleston*, 1 Call, 48, the bond recited the amount of the execution to be 7342 pounds of tobacco, including interest, costs, and the sheriff's commissions. The execution was only for 6940 lbs. tobacco. The Court of Appeals, reversed the judgment on account of the commissions being included, but gave judgment in favor of the plaintiff for the residue. Here the sum clearly was aggregate, and the commissions not specially stated in the bond. It was exactly the present case in that respect.

So in *Wilkinson v. McLochlin & Co.*, 1 Call, 49, the bond recited that the execution amounted to £195. 12s. 6d., including interest, sheriff's commissions, and all legal costs. But the execution was only for £187. 13s. 7d. The same judgment was entered by the Court of Appeals as in the last case, and yet there was nothing in the bond itself by which the error could be corrected.

These two last cases are exactly in principle the same as that now before us, and are decisive that the plaintiff is entitled to his execution for the whole amount of the condition of the bond, excepting the 49 cents error in calculating the commissions.

The plaintiff had better release the 49 cents before the award of execution is entered. Execution to be awarded.

Mr. Swann, for the plaintiff.

Mr. Youngs, for the defendant.

NOTE. The Hon. Allen Bowie Duckett took his seat on the Alexandria Bench, July 3d, 1806.

UNITED STATES v. G. N. LYLES.

A mere honorary obligation to indemnify a prosecutor, who is liable for costs, is not a sufficient interest to exclude the testimony of the witness.

INDICTMENT, for assault and battery on Joshua Riddle. John Johnston's name, as prosecutor, was indorsed on the indictment.

Joshua Riddle was examined as a witness on the part of the prosecution, and on cross-examination said he felt himself bound in honor to indemnify Johnston, in case he should be obliged to pay costs; but he had made no engagement; that Mr. Taylor, his counsel, had managed the business, and that he had no conversation himself with Johnston. See Peake's L. E. 93, 104, 105; 1 Str. 129.

Mr. Youngs, for the defendant, prayed the Court to instruct the jury that Riddle was not a competent witness, being disqualified by his interest.

The COURT (after considerable deliberation and doubt) refused to give the direction. (DUCKETT, J., absent.) The general principle seemed to be that it must be a direct interest, and not ideal or imaginary. Here was no promise, no direct engagement, no legal obligation.

MUIR v. GEIGER.

A receipt of a bond of a third person "in part pay" of a precedent debt is conclusive evidence of payment to that extent, although the obligor was insolvent at the time of the receipt given.

Indebitatus assumpsit, for a desk and bookcase sold and delivered. The defendant produced a receipt from the plaintiff, for a bond of one Allison, for £16. 14s. 10½d., "in part pay on a desk and bookcase."

The COURT (DUCKETT, J., absent,) said it was conclusive evidence that the bond was received in part payment, although the bond might have been unproductive, and Allison insolvent at the time.

UNITED STATES v. SANDFORD.

It is no ground for general demurrer to an indictment, for a misdemeanor under the laws of Virginia of 1792 and 1795, that the name of a prosecutor is not written at the foot of the indictment.

INDICTMENT, for assault and battery. General demurrer, because the name of a prosecutor was not indorsed according to the Act of Assembly.

Mr. E. J. Lee, for the traverser, cited the law of Virginia, of 13 November, 1792, and read the title of the act to show the intent to prevent vexatious and malicious prosecutions. The 24th section (p. 105) requires that "the name and surname of the prosecutor, and the town or county in which he shall reside, with his title or

profession shall be written at the foot of every bill of indictment for any trespass or misdemeanor before it be presented to the grand jury." By the 25th section the prosecutor is to answer for costs, and by the 28th section may be compelled to give security for costs. There must be a prosecutor to every indictment for a misdemeanor.

The Act of 1802, p. 431, by excepting cases where the indictment is sent up by order of Court, or found on the knowledge of two of the grand jury, shows this to be the true construction; so also the Act of 1795, p. 346, which requires that the names of the grand jurymen upon whose knowledge an indictment is found, and of the witnesses who have been called upon by the court or the grand jury, shall be indorsed on the indictment, declares that they shall not be liable for costs, implying thereby that if not called upon by the court or the grand jury they would be liable for costs.

In the cases of *United States v. Jamesson*, [*ante*, 62,] and *United States v. Singleton*, [*ante*, 237,] the objection was taken in arrest of judgment, which was supposed to come too late.

Mr. Jones, for the United States. The law did not mean that misdemeanors could not be prosecuted without a prosecutor. It did not mean to include those of a public nature, such as perjury, conspiracy, forgery, &c., but contemplated only such as result from an injury to a single individual. The construction depends upon the subject-matter upon which the legislature were legislating. The defendant relies upon a negative pregnant, viz., that no indictment shall be sent to the grand jury without a prosecutor. But the true construction is that where there is a prosecutor his name shall be indorsed; but where there is no prosecutor his name cannot be indorsed. The *prosecutor* means a person who prosecutes in the name of the United States, or in the name of the United States and himself. The civil law calls him *delator*. The prosecutor is not bound to pay the costs of the United States; he is only liable for the defendant's costs. The only penalty for not giving security for costs is, that the indictment shall be dismissed with costs, that is, costs against the commonwealth. *Prosecutor* means one who shares the penalty. Cowell, in his *Interpreter*, (tit. Prosecutor,) defines him as one that follows a cause in another's name. He calls them *promoters* — *promotores*, who prosecute in their own name and the king's. The oath of a grand juror is, that he shall present things that otherwise come to his knowledge. The practice in Virginia is variable. It has never been settled by the Court of Appeals. The construction, contended for by the defendant, would submit the whole penal code to the mercy of an individual.

Mr. E. J. Lee, in reply. It does not put the penal code in the power of an individual. It is not necessary that any one should take upon himself the odium of prosecuting. The grand jury or the court may call upon witnesses. The Attorney-General, *ex officio*, may file an information. The Court may order a bill of indictment. If the grand jury do not call on the witness, nor the Court, nor the Attorney-General, and the witness goes voluntarily to the grand jury, the legislature meant that there should be a prosecutor liable for the defendant's costs. As to the 25th section, if the prosecutor fails to give security for costs, the indictment is dismissed with costs *against* the prosecutor, not against the commonwealth. Affirmative statutes, giving a remedy, are to be construed as implying a negative of other remedies.

CRANCH, C. J., delivered the opinion of the Court. This is an indictment for an assault and battery, to which there is a general demurrer, on the ground that the name of a prosecutor, &c., was not written at the foot of the indictment before it was presented to the grand jury. The words of the 24th section of the law are: "And the name and surname of the prosecutor, and the town or county in which he shall reside, with his title or profession, shall be written at the foot of every bill of indictment for any trespass or misdemeanor, before it be presented to the grand jury." But the act does not say what shall be the consequence of an omission to comply with the command. It does not say that the indictment shall be quashed or dismissed, nor impose any penalty, or create any disability in the indictment; it does not say that such omission shall vitiate the indictment or render it void. But if it is made a necessary part of an indictment, perhaps the want of the name may be taken advantage of on general demurrer.

The question, then, will be, whether it be a necessary part of every indictment for a trespass or misdemeanor, that the name of the prosecutor, &c., should be written at its foot. If the words of this section are construed strictly, and if the omission to write the name of the prosecutor vitiates and renders void the indictment, then it is not in the power of government, nor of the grand jury, to prosecute an offender who has been guilty of the grossest misdemeanor, unless some individual person will become prosecutor, and make himself responsible for costs. For the words of the law are, "*every* bill of indictment for a trespass or misdemeanor." The grand jury could not find a bill even on their own knowledge, although bound to do so by their oath. The Court could not order a bill to be sent to the grand jury even for the most aggravated trespass or misdemeanor. It would be, as has been justly observed in the argument, to subject the whole authority of government as to the whole penal code, (excepting the case of

felony,) to the will of an individual. The 38th section speaks of the prosecutor in all offences, not capital, and authorizes the Court to compel the prosecutor to find security for costs. There seems, therefore, not more reason for supposing that the legislature meant to require a prosecutor in all cases not capital, than in those of trespass and misdemeanor only. The phraseology, also, of the Act of 1795, (p. 346, § 2,) countenances the suggestion, that the legislature did not mean to require a prosecutor to every indictment for a trespass or misdemeanor. It supposes the case that such an indictment may be found by a grand jury, upon the knowledge of two of their own body, or upon the testimony of a witness called upon by them, or by the Court, and then goes on to enact that the names of such witnesses shall be indorsed on the indictment, but provides that they shall not thereby be subjected to costs.

This shows, that by the first act, a prosecutor was not always necessary, and even if he was, yet by the Act of 1795, there were three cases in which no prosecutor was required. If, then, it be not necessary that the name of a prosecutor should be indorsed on *every* indictment for a trespass or misdemeanor, the mere want of such indorsement is not a good ground of general demurrer. Besides, it does not appear that the witnesses, whose names are indorsed on the indictment, were not called upon by the grand jury, or the Court. By their names being indorsed, it is to be presumed that they were so called upon, because it is not necessary that in any other case their names should be indorsed. If they were thus called upon, it seems to be a fair inference, from the Act of 1795, that no prosecutor was required.

But it is said that the Act of January 28, 1802, (p. 431,) contains evidence of a legislative construction of the Act of 1792, (pp. 102, 105,) and that such construction is to be respected, although the Act of 1802 itself is not in force in the District of Columbia.

The answer to this is, that it is the province of the judiciary, and not of the legislature, to declare what the law is or has been. The legislature can only say what it shall be. A subsequent declaration by a legislature of the meaning of a prior law, cannot alter that law as to past cases. It cannot give to the law any other construction than that which would have been fairly given by the judicial department. But the preamble of the Act of 1792, says only, that there have been doubts as to the construction, for the *removing whereof*, &c., which must mean, for the future. If it was intended as an *ex post facto*, or rather a retrospective law, it cannot operate here, because subsequent to our separation from Virginia; if it is only evidence of a legislative

construction, it is not more binding on the judiciary, than if it had been an executive construction. It is not, in fact, evidence of any legislative construction; it is only evidence of the existence of doubts in the mind of some person or persons; and even those doubts cannot be supposed to extend farther than the remedy which the legislature applied, which was only to the case of an indictment founded upon a presentment made on the knowledge of the grand jury, or of two of their members. Nothing, therefore, can be inferred from the Act of 1802.

The words of the Act of 1792, are not that the name of "*a* prosecutor," but, the name of "*the* prosecutor." By thus using the definite article, the legislature must be presumed to speak of some particular prosecutor. The question which naturally occurs upon the words "*the* prosecutor," is, *what* prosecutor? The answer must be, the person who voluntarily goes before the grand jury with his complaint. Before, therefore, you can require that the name of such a prosecutor should be written at the foot of the indictment, you must show his existence. You must show that there was some person who voluntarily complained to the grand jury. Even then it seems doubtful whether a general demurrer would be the mode of taking advantage of the omission.

A general demurrer admits the fact, that the traverser did assault and beat the person named in the indictment. The offence is legally, substantially, and technically set forth. The facts stated in the indictment are all well pleaded, and therefore are all admitted by the demurrer. It would be a strange construction of the act, which would suppose that the legislature intended that the traverser, after confessing himself guilty, should avail himself of a provision which was only to enure to his benefit in case of his innocence. It seems to the Court, that the only mode of taking advantage of the omission, in the case where the advantage could be taken, would be by a motion to quash the indictment, grounded upon the fact apparent upon the record, or supported by affidavit, that some person (naming him) did voluntarily complain to the grand jury of the offence stated in the indictment.

NORWOOD v. SUTTON.

Supplemental affidavits will not be received upon a motion for the continuance of a cause.

To support a plea in abatement, for not naming all the joint promisors, it is not necessary for the defendant to prove that the plaintiff knew he was dealing with a copartnership.

ASSUMPSIT for freight of goods. Plea in abatement, that the

Ex parte Negro Letty.

promise, if any, was made by the defendant jointly with one John Mandeville.

Mr. Jones, for the defendant, moved for a continuance of the cause on affidavit.

The COURT thought the affidavit not sufficient, and refused to receive a supplemental affidavit, on the ground that it is a practice leading to perjury. The Court referred to the case of *Dawson v. Boyd*, at Washington, on a *habeas corpus* from Alexandria.

Mr. Jones prayed the Court to instruct the jury, that it is not necessary for the defendant to prove that the plaintiff knew of the partnership. *Rice v. Shute*, 5 Burr. 2611, and *Abbott v. Smith*, 2 W. Black. 947; *Watson on Partnership*, 240.

Mr. Youngs, contra. The plaintiff is not bound to know the partners, but if the plaintiff knew he was dealing with a company, then the defendant may plead partnership. The defendant must show that the plaintiff knew that the defendant was in partnership with somebody. *Watson on Partnership*, 235.

The COURT, (*nem. con.*) instructed the jury, that upon this issue on a plea in abatement, it is not necessary for the defendant to prove that the plaintiff knew of a partnership between the defendant and any other person, nor that Mandeville was his partner at the time of the contract, that fact not being in issue.

FRAZIER *v.* LOMAX.

Upon executing a writ of inquiry upon a judgment by default, the jury must find at least one mill in damages.

UPON the execution of a writ of inquiry.

Mr. Youngs, for the plaintiff, said the practice was to find a cent, without any evidence, the default having admitted something to be due.

The COURT instructed the jury that they might and ought to find the smallest possible sum due, which was one mill, being the smallest money of account known in the United States. Verdict accordingly.

Ex parte NEGRO LETTY.

A petitioner for freedom, in custody, will not be discharged upon the request of the master, unless upon security given by him to have the petitioner forthcoming, &c., to prosecute a claim for freedom.

HABEAS CORPUS upon the petition of a man claiming to be the

Vowell v. Lyles.

master of the negro Letty, committed to jail by a magistrate, upon a complaint made that she was entitled to her freedom under the law of Virginia, December 25, 1795, (P. P. 346.)

Mr. Youngs, for her master, contended that the justice had not stated that the master failed or refused to give bond. That her title to freedom must be proved, by legal evidence, before she can be detained against the will of the master. The negro had been confined in jail in Washington, and, while in jail there, was sold by B. G. Orr to Henry Dawes, of Georgetown, by him brought to Alexandria, and sold to Dozier, of South Carolina. She had petitioned for her freedom in Washington county, where the petition was still pending.

Mr. Hiort, for the prisoner, filed a petition praying that she may be protected from being removed out of the district, until her petition for freedom can be heard in Washington.

The COURT, after consideration, refused to suffer the master to take the negro away, unless upon giving security not to take her out of the District of Columbia, &c. according to the Maryland practice, and remanded her.

 GORDON v. RIDDLE.

If bail has not been required upon the *capias ad respondendum*, it will not be required upon setting aside the office judgment without affidavit.

ASSUMPSIT against the drawer of a check; no affidavit to hold to bail.

Mr. E. J. Lee moved to set aside the office judgment, without giving bail, no bail being originally required.

Mr. C. Lee, *contra*, produced the check, but no affidavit.

The COURT permitted the defendant to appear, and set aside the office judgment without special bail.

 VOWELL v. LYLES.

To set aside an office judgment, the court will not permit the defendant to plead specially, matter which may be given in evidence upon the general issue.

ASSUMPSIT against indorser of a promissory note.

Mr. Youngs, to set aside the office judgment, offered to plead,
1. Non assumpsit. 2. That the maker had, at the time of the institution of the suit, more property in his hands than would have

United States v. Browning.

discharged the debt. 3. That no consideration passed from plaintiff to defendant.

The COURT refused to receive the two last pleas, because the facts, if they amounted to a defence, may be given in evidence under the general issue.

UNITED STATES v. BROWNING.

In all cases of felony, by the laws of Virginia, the prisoner is entitled to a peremptory challenge of twenty jurors.

THE COUNSEL for the prisoner, namely, *Messrs. C. Simms, C. Lee, E. J. Lee, and Hiort*, contended, that as this theft was charged in the indictment to have been done feloniously, the prisoner had a right to a peremptory challenge of twenty jurors, under the Act of Assembly (Old Rev. Code, 109.) See *U. S. v. Michael Car-rigo*, [*ante*, 49.]

CRANCH, C. J., delivered the opinion of the Court. This is an indictment under the Act of Congress of 1790, [1 Stat. at Large, 112,] for stealing a tub of butter. The indictment states that the prisoner feloniously took, and carried away, &c., contrary to the form of the statute in the case made, &c. The question for the consideration of the Court is, whether the prisoner is entitled to a peremptory challenge.

By the Act of Congress of March 3, 1801, [2 Stat. at Large, 115,] it is enacted, "That all felonies, committed within the county of Alexandria, shall be punished in the same manner as such crimes were punishable by the laws of Virginia, as they existed prior to the year 1796." The indictment charges a felony, and by the laws of Virginia, as they existed prior to 1796, its punishment was death, with the benefit of clergy.

The Act of Assembly of Virginia of November 13, 1792, (p. 103, Old Rev. Code, 110, § 8,) says, "No person, arraigned for treason, shall be admitted to a peremptory challenge above the number of twenty-four, nor shall any person, arraigned for murder or felony, be admitted to a peremptory challenge above the number of *twenty*." And the 18th section declares, that if the prisoner persists in challenging more than the law allows, he shall be considered as convicted, and judgment shall be passed accordingly. The Act of December 26, 1792, (p. 206,) § 3, declares, that if any principal offender shall be convicted of any felony, or shall challenge peremptorily more than twenty of the jurors, it shall be lawful to proceed against the accessory in the same manner as if such principal felon had been attainted thereof,

"notwithstanding such principal felon shall be admitted to the benefit of his clergy." This shows clearly the understanding of the legislature, that in clergyable offences the prisoner had a right of peremptory challenge. Indeed, it is a common law privilege in all cases of felony, which has not been taken away by an Act of Assembly. By the Act of 15th December, 1796, § 13, (p. 357,) the Penitentiary Act of Virginia, the claim of benefit of clergy is abolished. But by the 26th section (p. 359) the privilege of peremptory challenge is retained in all cases where it was enjoyed before that act. By the Act of 27th November, 1789, (pp. 45, 46,) the benefit of clergy is to be allowed in all cases where it is not expressly taken away by Act of Assembly.

The indictment describes the common law offence of grand larceny, and by striking out the words, "contrary to the form of the statute, &c.," it will be a good indictment at common law. As to the punishment of felonies, the Act of Congress of 3d March, 1801, [2 Stat. at Large, 115,] is positive, and so far repeals the Act of 1790. But if the indictment had not charged the taking to be felonious, it may be doubted whether it would not have been a good indictment under the Act of 1790, and whether the Court might not have imposed the statutory punishment, and denied the claim of peremptory challenge. However, inasmuch as it is charged as a felony, and the laws of Virginia give a right of peremptory challenge in all cases of felony, there can be no question that the prisoner is entitled to it.

VOSS v. LUKE.

This Court has power to send an attachment into Virginia, for a witness in a civil cause, who resides within one hundred miles of the place of trial; and such attachment is to be directed to, and served and returned by, the marshal of Virginia.

Mr. Youngs, for the defendant, moved for an attachment against witnesses who reside in Virginia, within one hundred miles of this place, and who have been summoned and failed to attend.

Mr. Jones, contra. The process of attachment is of a criminal nature, and not devised merely to bring a witness into court. *Hammond v. Stewart*, 1 Str. 510; *Wyatt v. Winkworth*, 2 Id. 810; *Small v. Whitmill*, Id. 1054; *Chapman v. Poynton*, Id. 1150. The courts of the United States are of limited jurisdiction in criminal as well as in civil actions. The power to issue a summons does not imply a power to issue an attachment, which is a mere criminal process, and effects the end of obtaining the attendance of the witness only collaterally. Before an attachment can

be issued, it must be taken for granted that an offence has been committed ; and if committed in this case, it was committed in Virginia, out of the jurisdiction of this Court. Besides, no officer is bound to execute it, or can execute it. The marshal has authority only within his district. By the 27th section of the Judiciary Act of 1789, [1 Stat. at Large, 87,] the power and duty of the marshal are only to execute, "throughout the district, all lawful precepts directed to him." But the party is not without remedy. The service of the subpoena raises a duty, and he may have an action against the witness for damages. The authority of a marshal to convey a prisoner from one district to another is only given, in a special case, by the 33d section of the Judiciary Act of 1789 ; and it must be by a special warrant for that purpose. If a person in Virginia has committed an offence here, the only mode of proceeding is, to apply to a judge or magistrate in Virginia for a warrant of arrest, and to the Judge of the United States District Court for another warrant to bring him here for the trial. The compulsory process, mentioned in the 8th amendment of the Constitution, does not mean an attachment. That provision gives no right to punish by fine and imprisonment.

Mr. Youngs, in reply. The remedy by action would be of no avail. It would be uncertain whether any damages would be given, and if given, whether the party would be able to pay them. The marshal is bound to execute all lawful precepts, and, when executed, to return them. If he can begin to execute, he may finish.

The Court took time to consider, and at November term, 1806,

CRANCH, C. J., delivered the opinion of the Court. The questions, arising in this case, are, 1. Can the Court issue an attachment of contempt, in any case, against a witness in a civil cause, for not attending according to summons? 2. If so, upon what evidence of contempt will the Court issue it? 3. Can the Court issue an attachment against a witness in a civil cause, who resides out of the district, but within one hundred miles from the place of trial? 4. If so, to what officer shall it be directed?

1st. There seems to be no reason to doubt the power of the Court to grant an attachment of contempt against a witness for not attending according to summons. The disobedience of any lawful command of a court of record is, at common law, a contempt of the authority of the court ; and for all such contempts the common law process is an attachment.¹ The common law being part of the law of Virginia, became part of the laws declared by the Act of Congress of the 27th of February, 1801,

¹ See the authorities cited in the note at the end of this case.

[2 Stat. at Large, 103,] to be in force in this country. Hence, whatever powers are, by the common law, incident to a court of record, may be exercised by this Court, unless restrained by statute; but so far from being restrained by statute, the power of punishing contempts, and particularly that of a witness refusing to attend according to summons, is recognized by the statutes of Virginia and of the United States. By the Judiciary Act of 1789, [1 Stat. at Large, 73,] it is enacted, that "all the courts of the United States shall have power to punish, by fine and imprisonment, at the discretion of the said courts, all contempts of authority, in any cause or hearing before the same;" and in the 14th section of the same act, (p. 81,) the power is given to issue all writs "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." An attachment is a writ agreeable to the principles and usages of law, and is necessary for the exercise of their jurisdiction as to contempts. It is also necessary in another point of view. The court cannot exercise its jurisdiction in common cases unless the testimony of witnesses can be had either by deposition or *vivâ voce*. If the witness in any cause is within one hundred miles of the place of trial, he cannot be compelled to give his deposition; and his deposition, if taken, cannot be used; and if his personal attendance cannot be had, the court cannot exercise its jurisdiction in that cause, and his personal attendance cannot be had but by an attachment. An attachment, therefore, is a writ necessary for the exercise of the jurisdiction of the court in the trial of causes, as well as in the punishment of contempts. By the Act of Congress of the 13th of February, 1801, [2 Stat. at Large, 89,] which was in force on the 27th of February, 1801, one judge of the Circuit Court was authorized to hold a court for certain purposes, and to direct subpoenas for witnesses to attend the same, and the requisite process on the non-attendance of witnesses and jurors, and to award and issue process, and order commitment for contempts. And by the Act of February 27, 1801, this Court and its judges have the same powers which were given to the circuit courts by the Act of February 13th, 1801.

But it has been said, in argument, that the Act of Virginia of November 29, 1792, § 4, (p. 278,) having imposed a penalty of 16 dollars upon a witness failing to attend, and having given the party injured a right to sue the witness for damages, contains an implied prohibition of any other remedy or process to compel his attendance. But the 7th section of the same act recognizes a compulsory process different from a subpoena. The words are, "any subpoena or process to require or compel the attendance of any witness, may be served or executed in the district, county, or

corporation, where the said witness shall be found." This clause, as we understand it, ought to be construed *reddendo singula singulis*, so as to read thus: "Any subpcena. to require, or process to compel, the attendance of any witness, may be served or executed (that is, the subpcena to require may be served, or the process to compel may be executed,) in the district, &c., where the witness may be found. Here, then, is a direct recognition, by the law of Virginia, of a "process" "to compel" the attendance of a witness, and which is to be "executed" on the witness wherever he may be found. The Act of Virginia, section 4, is evidently intended to be a copy, substantially, of the 12th section of the Stat. of 5 Eliz. c. 9, which, in England, has never been construed so as to deprive the courts of the power of proceeding against a witness by attachment.

Taking it, therefore, as established, that this Court has power to issue an attachment of contempt against a witness for disobedience to a summons, it is to be considered, 2d. Upon what evidence of contempt will the Court issue it? It is laid down by Bacon, (1 Ab. 180,) that it may be awarded upon a bare suggestion; *à fortiori*, therefore, it may be issued upon the return of a sworn officer, who certifies that he has summoned the witness; and upon the record of the court, which certifies that, being called, the witness failed to attend according to the summons. And this is the usual practice of the courts in Maryland. What the practice has been in Virginia we are not informed. In New York it is not usual to grant an attachment in the first instance, *Jackson v. Mason*, 2 N. Y. T. R. 92; and in England, it seems that the court has usually required an affidavit, and seldom grants an attachment without a previous rule to show cause. But in England the motion for an attachment is not made at *nisi prius*, but in the Court at Westminster Hall; and the object is not to obtain the attendance of the witness, but to punish him for his contempt. In this country it is used as the means of compelling an actual attendance on the trial, so as to prevent a continuance of the cause to a subsequent term. If the witness, when brought in, clears the contempt on oath, he is discharged without fine. The return of the officer and the non-attendance of the witness, are certainly *primâ facie* evidence of a contempt of the process of the court; and the remedy by attachment is found to be productive of very little inconvenience, and that is far overbalanced by the promptness of the remedy. The affidavit of a party could be very little more satisfactory to the Court than the return of the *subpcena*. We are therefore of opinion, that the practice heretofore adopted by the Court is proper.

But the great question is, 3dly, can the Court issue an attach-

ment, in a civil cause, against a witness who resides out of the district, but within one hundred miles of the place of trial? The constitution of the United States (eighth amendment) declares, that in criminal prosecutions, the accused shall have *compulsory* process for his witnesses. What is *compulsory process*? Not a summons alone. No other compulsory process for witnesses is, or has been known, by the laws of England, or of this country, than an attachment of contempt. It is true, in criminal prosecutions, the government bind their witnesses over by recognizance; and, if they do not attend, their recognizances are forfeited; but this is not compulsory process; a man may choose to forfeit his recognizance rather than attend. On criminal prosecution, therefore, we take it for granted that the accused would have a right to attachment for his witnesses; and as, in such cases, depositions cannot be used, the attachment must, of course, run through the United States, because the constitution has guaranteed to him this right.

By the Act of Congress of March 2d, 1793, [1 Stat. at Large, 333,] subpoenas in criminal cases, may run from one district into any other; and in civil cases also to the extent of one hundred miles from the place of trial. Why should Congress give the power to send subpoenas without giving the power of enforcing them? It would be a mere waste of time, and a means of bringing the authority of the Court into contempt. Congress seems to have taken it for granted that it was sufficient to give the Court the right to require the attendance of the witness, and that the usual and necessary power of all courts to compel obedience to their lawful orders, by attachment, was sufficient to enforce the subpoena. So far as a court has jurisdiction lawfully to command, it seems to follow that it has jurisdiction to cause its command to be respected. As it regards the attendance of witnesses in criminal cases, each court of the United States has jurisdiction over the whole United States; and, in civil cases, to the extent of one hundred miles. That such was the understanding of the legislature is evident from the provisions of the Acts of Congress. The Judiciary Act of 1789, [1 Stat. at Large, 73,] authorizes the taking of the deposition of a witness who lives more than one hundred miles from the place of trial, "or who is about to go out of the district, and to a greater distance than as aforesaid." Why take his deposition if he lives more than one hundred miles from the place of trial? Because you cannot compel his attendance. Why not take his deposition if he is within one hundred miles? Because you may compel his attendance at the trial. Why not take his deposition if he is about to go out of the district, but not one hundred miles from the place of trial? Because you may

compel his attendance. Why permit his deposition to be read if he has gone out of the United States, but not one hundred miles from the place of trial? Because you cannot compel his attendance. The same act declares that "any person may be compelled to appear and depose as aforesaid;" (that is, any person who lives more than one hundred miles from the place of trial; or is about to go out of the district and more than one hundred miles from the place of trial, may be compelled to appear and depose.) How compelled? "In the same manner," says the act, "as to appear and testify in court;" that is, as the same persons might be compelled to appear and testify in court, if they were within one hundred miles of the place of trial, although they should be out of the district; for you cannot take the deposition of a witness who is about to go out of the district, unless he is about to go more than one hundred miles from the place of trial; and if you do take his deposition, you cannot use it, says the same act, unless it shall appear to the satisfaction of the court that the witness is dead, or gone out of (not the district, but) the United States, or to a greater distance than as aforesaid from the place where the court is sitting. If this Act of Congress neither authorizes the court to compel the attendance of a witness who is out of the district, but within one hundred miles of the place of trial, nor allows his deposition to be read in evidence, the testimony of such witness may be entirely lost. But by not allowing his deposition to be read it is evident that Congress intended to give the court power to compel his attendance. It has been said, in argument, that the power to issue a summons does not imply the power to send an attachment.

The expressions of the Act of Congress are that "subpœnas may run into any other district," &c. The words "may run" will perhaps bear a more comprehensive meaning than words containing a simple power to issue a summons to another district. But in either case, we think the authority to command the attendance of a witness necessarily implies a power to enforce that command. The means of enforcing it is an attachment, which is a common law weapon given to every court of record, and without which it would soon sink into disgrace and contempt. As far as the authority of the Court extends, so far is that authority to be protected by the punishment of its contempt. It has been said that the contempt is an offence committed in another district, and therefore cannot be punished in this. But although committed out of the district, it was still within the jurisdiction of the Court *quoad hoc*. As to the commanding and compelling the attendance of witnesses, the jurisdiction of the Court extends to the distance of one hundred miles from the place of trial. It has been con-

tended, also, that the court has no power to send criminal process out of the district ; and in support of this proposition the first Judiciary Act of the United States, [1 Stat. at Large, 73,] has been cited ; which provides that, if an offender be found in a district, other than that in which he is to be tried, he can only be arrested by a warrant issued by some authority within the district where he is found ; and that the judge of that district shall issue, and the marshal shall execute, a warrant for the removal of the offender to the district where the trial is to be had.

This objection may receive the same answer as the last, — namely, that in the one case the court has jurisdiction, and in the other it has not. In the case of a criminal, this Court is not authorized by law to command the offender, in another district, to attend the court in this. No jurisdiction, *quoad hoc*, is given.

It has also been objected that no officer is bound to execute it, because the marshal of the District of Virginia is only bound to execute process within his district ; and the marshal of the District of Columbia, within his district only ; so that neither marshal has power fully to execute it. The answer to this objection is, that if the court has the power of compelling the attendance of the witness, its process is lawful. The Act of Congress, it is true, is peremptory that he shall execute throughout his district, &c., but it does not forbid him to finish an execution out of it ; and his oath binds him to execute and return all lawful precepts to him directed, whether in or out of his district. For these reasons we have no doubt that this Court has the power of compelling, by attachment, the attendance of witnesses who live within one hundred miles of the place of trial, although out of the District of Columbia.

The next question is — 4th. To what officer shall the attachment be directed ? Undoubtedly to the marshal of the district in which the witness lives. It is declared by the Judiciary Act of 1789, § 27, [1 Stat. at Large, 73,] to be his duty “to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States,” and he is bound by his oath not only to execute all lawful precepts directed to him, but also to make true returns ; and that, without any restriction as to the district from which such precepts are to issue, or to which they are to be returned. If, then, it is lawful for this Court to issue subpœna, commanding the marshal of the District of Virginia to summon a witness who lives in that district to attend the court in this, it is a lawful precept to him directed, under the authority of the United States, and he is bound to execute and return it. So if this Court has the power of compelling the attendance of such witness by attachment, the writ of attachment is equally a lawful

precept to him directed, under the authority of the United States, and he is equally bound to execute and return it. The whole question is finally resolved into that of the power of the court to compel the attendance of the witness; for if the court has that power the process is lawful; and if lawful, the marshal is bound to execute and return it.

Upon the whole, therefore, we are satisfied that this Court has the power to send an attachment into the District of Virginia, for the purpose of compelling the attendance of a witness, provided it appears by affidavit that the witness lives within one hundred miles of the place of trial; and we think the return of the marshal upon the subpoena, and the record of the default of the witness, and the affidavit as to residence, sufficient *prima facie* evidence of a contempt, upon which to issue the attachment. See also the case of *Wellford v. Miller*, in Alexandria, July term, 1808, [*post.*]

NOTE. Attachment for contempt. 1 Bac. Ab. 180. It issues at the discretion of the judges of a court of record against a person for some contempt, for which he is to be committed; and may be awarded by them upon a bare suggestion, or on their own knowledge, without any appeal, indictment, or information; and this summary method of proceeding is certainly now established as part of the law of the land. See, also, 4 Bl. Com. 284; *Hammond v. Stewart*, 1 Str. 510; *Wyat v. Wingford*, 2 Ld. Raym. 1528; *Chapman v. Pointon*, 2 Str. 1150; *Bowles v. Johnson*, 1 W. Bl. 36; *Pearson v. Iles*, Doug. 560; *Rex v. Plunket*, 3 Burr. 1329; *Rex v. Ring*, 8 T. R. 585; Tidd's Pr. K. B. 256; *Respub. v. Oswald*, 1 Dal. 323; *Jackson v. Mann*, 2 N. Y. T. R. 92; *Stretch v. Wheeler*, Barnes, 497.

ALEXANDER v. PATTEN.

The defendant is not, of course, entitled to a continuance, upon the death of the plaintiff.

THE plaintiff died since the last term, and the administrator appears at this term. The issue was made up at the last term.

Mr. Youngs, for the defendant, contended that he was of right entitled to a continuance. By the Act of Assembly of Virginia, (P. P. 110, § 20,) all suits abate by the death of a party, unless there has been a verdict or interlocutory judgment. But the Judi-

Bennett v. Scott.

ciary Act of 1789, [1 Stat. at Large, 73,] provides that the suit shall not abate, but that the defendant shall answer thereto.

The COURT refused a continuance as a matter of right under the Act of Congress, which was admitted by all the bar to be in force in such a case, as it provides for a case different from that in the Virginia Act. The Court referred to the case of *Codman v. Wilson*, in the Supreme Court, where the point was decided.

JONES v. GREENOLDS.

The return of *non est* upon a subpoena issued only a few days before the sitting of the Court, is not a sufficient evidence that the witness is "unable" to attend, so as to enable the party to read his deposition taken *de bene esse*, under the Act of Virginia.

ASSAULT AND BATTERY.

Mr. Youngs, for the plaintiff, contended, that he had a right to read the deposition of Beckwith Green, taken *de bene esse*, upon showing that a subpoena had been issued to the marshal of the District of Columbia, and returned *non est*. It was issued only a few days before the sitting of the Court. He cited the case of *Broadwell v. McClish & Wolves*, at April term, 1801, [*ante*, 4.]

But the COURT said, that under the Act of Assembly, (P. P. 279, § 12,) the party who would use such a deposition, must show that the witness is unable to attend, and that the return of the subpoena is not satisfactory evidence to the Court of that fact. The fact was then proved by affidavit, and the deposition was read.

CHARLES BENNETT v. JAMES S. SCOTT.

If the goods sold belonged to a partnership at the time of sale, the action must be brought in the name of all the partners, although the defendant was ignorant of the partnership.

Mr. E. J. Lee, for the plaintiff.

Mr. Youngs, for the defendant.

The COURT instructed the jury, that if they shall be of opinion, from the evidence, that the goods sold and delivered by Charles Bennett to the defendant, were, at the time of the sale, the joint property of C. Bennett and J. Watts, and sold for their joint benefit, the law raises a promise from the defendant to Bennett and Watts jointly, and not to Bennett alone; and that Bennett alone cannot, in the lifetime of Watts, support this action, although the goods may have been sold in the name of Bennett, and the defendant was, at the time of the purchase, ignorant of the existence of the partnership.

HINES AND WIFE v. CRAIG, Administrator of Mitchell.

Outstanding judgments cannot be given in evidence, on *plene administravit*, but must be specially pleaded.

ASSUMPSIT, *non assumpsit*, limitations, and *plene administravit*.

Mr. E. J. Lee, for the defendant, showed prior judgments outstanding.

Mr. Swann, for the plaintiff, objected that, unless the defendant shows actual payment of those judgments, they cannot be given in evidence under a general plea of *plene administravit*, but must be pleaded specially.

And the COURT so decided.

HURLIKI'S ADMINISTRATOR v. BACON *et al.*

If there be judgment for one of several defendants, upon a demurrer to his separate plea of bankruptcy, he may be examined as a witness for the other defendants, upon executing a release of his interest in his estate.

Parol evidence cannot be given of the understanding of the parties as to the obligation of a written contract.

ASSUMPSIT on an agreement in writing. James Bacon, one of the defendants, having pleaded bankruptcy, the plaintiff demurred generally.

The COURT overruled the demurrer, and

Mr. Youngs, for the defendants, offered Bacon as a witness.

The COURT admitted him to be sworn, upon executing a release of all right to a surplus and commission, &c.

The COURT (FITZHUGH, J., absent,) refused to permit parol evidence to be given as to the intention and understanding of the parties as to the obligation of the contract, and that the defendants were not to be personally liable, and were only to pay as they collected money from the subscribers.

Three bills of exceptions were taken.

LINDENBERGER v. WILSON.

It is necessary that the holder of a foreign bill, protested for non-acceptance, should give notice of the protest as soon as possible under all the circumstances, according to the usual course of communication.

ASSUMPSIT by the indorsee against the indorser of a foreign bill of exchange, drawn by Foreman on Rutherford & Westphalia,

 Thomas v. Woodhouse.

at Hamburg, in favor of the defendant, and by him indorsed to the plaintiff.

The action was upon the non-acceptance only, and the COURT instructed the jury, that the plaintiff was bound to give notice to the defendant of the non-acceptance of the bill, as soon as possible under all the circumstances, according to the usual course of communication, whether by land or water; and that it was the duty of the plaintiffs, who reside at Baltimore, to give notice to defendant as soon as possible, according to the course of the mail between Baltimore and Alexandria. See Chitty on Bills, 93, 98, 139, 140; Kyd, 76.

MOORE v. DULANY.

The Court will not compel the opposite party to produce depositions taken by consent, nor enforce the private agreements of counsel, but will see that parties are not entrapped by such agreements.

ASSAULT AND BATTERY.

Mr. Youngs, for the defendant, stated to the Court that the plaintiff had, by consent of defendant's counsel, taken the deposition of Mrs. Hodge and Mrs. May, and he now called upon the plaintiff to produce them, and prayed the Court to compel the plaintiff to produce them. But the COURT refused, there being no consent entered on record, and the Court cannot undertake to enforce the private agreements of counsel, they must depend upon the honor of each other. The COURT will not suffer a party to be entrapped by such agreements.

Verdict for the plaintiff, one cent.

THOMAS v. WOODHOUSE.

The defendant may, at the trial-court, give notice to a non-resident plaintiff, that security for costs will be required, and the cause will be continued if the plaintiff is not ready to give the security.

THE COURT continued this cause to enable the defendant to give notice, (according to law of Virginia, P. P. 111,) that security for costs will be required.

CRANCH, C. J., *contrà*, thought that the law did not intend that the plaintiff should be defeated of his trial, unless sixty days' notice had already been given.

Mr. Swann and *Mr. E. J. Lee*, for the plaintiff.

Mr. Taylor and *Mr. Hiort*, for the defendant.

YOUNG & CO. v. BELL & WRAY.

Infancy cannot be given in evidence upon the plea of *nil debet* to an action of debt on a promissory note in Virginia. The promissory note of an infant is voidable, but not void.

DEBT on a promissory note. The defendant pleaded *nil debet*, and offered evidence of infancy in support of the plea.

Mr. Youngs, for the plaintiff. There is a difference between contracts void and voidable. This note was not void, but voidable. If infancy be pleaded, the plaintiff may reply that it was given for necessities. The plaintiff ought to have notice of the defence, that he may be prepared to rebut it by evidence of necessities furnished, or that the defendant was of age, or that after full age, he acknowledged the debt. If not pleaded, notice ought to be given, as in cases of set-off. It is not a defence of which the plaintiff can have knowledge, as in the case of limitations, which the Court has decided cannot be given in evidence on *nil debet*. The Act of Assembly, (Revised Code, 36, § 3,) has made a note a substantive cause of action of debt.

Mr. F. L. Lee and *Mr. E. J. Lee*, *contrà*. The plaintiff must prove his debt. Whatever shows there is not a debt is good evidence on this plea. A promise of an infant is absolutely void. A contract must imply an assent, but he cannot assent. *Nil debet* is a good plea where there is no debt. 3 Com. Dig. 165; 5 Com. Dig. 240. Infancy may be given in evidence on *non assumpsit*, (*Darby v. Boucher*, 1 Salk. 279,) although it is otherwise in case of a deed. *Zouch v. Parsons*, 3 Burr. 1805; *Whelpdale's case*, 5 Co. 119. A promise of an infant is as void as a bond of a *feme covert*. It is clear that on *non assumpsit* it may be given in evidence. Gilb. Law of Ev. 164, (old edition.) There is a difference between *non est factum* and *non assumpsit*. On the latter plea it may be given in evidence. Solemn contracts, which require delivery, are voidable only; but simple contracts are void. If plaintiff can show that the note was given for necessities, he may do it on *nil debet*. The general principle is, that infancy may be given in evidence on the general issue. 1 Salk. 278; Buller, 152; Gilb. Com. Pleas. 64, 65; Loft's Gilb. L. E. 368, 369; 4 Bac. Ab. 61; 1 Sid. 51; 12 Vin. 76.

Mr. Noblet Herbert, in reply. In cases of usury and coverture, the instrument is absolutely void. But in case of infancy, it is only voidable. There is a difference between a note and an account. A note reduces the matter to a certainty, but an account

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does not. The Act of Virginia, also, which gives an action of debt upon a promissory note, makes a difference, and puts it on the ground of a specialty. The authorities, which say it may be given in evidence on the general issue, mean in actions of assumpsit, not in actions of debt. See *Trueman v. Hurst*, 1 T. R. 40; *Crantz v. Gill*, 2 Esp. R. 472; *Clare v. E. of Bedford*, 1 Str. 168; Vin. 536; 2 Str. 1101.

The COURT, having taken time to consider, decided, (*nem. con.*) that infancy cannot be given in evidence, on the plea of *nil debet* to an action of debt on a promissory note, being of opinion that it is not void, but voidable. See *Hyer v. Hyatt*, at Washington, December, 1827.



STRAAS v. THE MARINE INSURANCE COMPANY OF ALEXANDRIA.

Upon a valued policy, a misrepresentation as to the age and size of the vessel will not avoid the policy. If there be no warranty of neutrality, the policy covers belligerent risks.

When depositions have been taken by one party without notice to the other, the cause may be continued.

COVENANT on a policy upon the brig Hope, whereby the defendant, in consideration of a premium of seventeen and an half per cent. "paid by W. Hodgson for G. F. Straas and others of Richmond," insured eight thousand dollars on the brig Hope, a prize vessel, at and from her last port of lading in St. Domingo, to a port of discharge in the Chesapeake, valued at ten thousand dollars. The loss was stated to be by capture by British vessels, and condemned in Jamaica. Issue was joined on the 1st, 2d, 3d, 7th, and 8th pleas, and demurrer to the 4th, 5th, and 6th.

The 4th plea was, That to induce the defendants to sign and seal the policy, insuring eight thousand dollars on the vessel, the plaintiff represented that she was a stout, well-built vessel of about 250 tons burden, in good order and well found, &c., built in Massachusetts, and from six to seven years old; and that in consequence of such representation, and placing full faith and credit therein, they signed, sealed, &c., and they aver that she was not about 250 tons burden, but of less burden than 165 tons, namely, about 162 tons, and was not from six to seven years old, but more than eight and a half years old, and that she was not worth eight thousand dollars, and was built in the province of Maine, in Massachusetts, in 1790, and this they are ready to verify, &c.

Mr. Hiort and *Mr. Swann*, for the plaintiff, contended that the plea was bad because it does not aver that the misrepresentation

was fraudulent or material to the risk, and because there is always an implied warranty of seaworthiness which covers the objection as to the age and tonnage of the vessel; and the value is fixed by the policy. 5 Bac. Ab. 444, (Guillim); Marshal, 200, 252, 335, 336; *Lewis v. Rucker*, 2 Burr. 1171; *Trevian v. Lawrence*, Salk. 277; Marshall, 341; Park, 207, 322, 397; *Barnewall v. Church*, 1 N. Y. T. R. 217; *Crawford v. Hunter*, 8 T. R. 23; *Page v. Fry*, 2 B. & P. 243.

Mr. C. Lee and *Mr. E. J. Lee*, for the defendants, contended that if the plea alleges facts which in law amount to fraud, it is not necessary to aver fraud. The misrepresentation as to the size and age of the vessel went to support the false allegation that it was worth eight thousand dollars, when in fact it was worth only three thousand. 1 Wooddeson, 207, 208; *Filles v. Brutton*, Park, 182, 204; Marshall, 586; *DeGhelloff v. London Ins. Co.* 4 Bro. Parl. Cas. 436; Marshall, 348; *Stewart v. Dunlap*, Park, 236; Marshall, 208, 350; *Haywood v. Rogers*, Smith's Rep. 289; Marshall, 200, 201, 601; *Bright v. Ennon*, 1 Burr. 396; Marshall, 335, 339, 340; Park, 195; *Sheily v. Wilkinson*, Doug. 306, in note; *McDowall v. Fraser*, Doug. 260; Marshall, 348; Millar, 46, 47, 52; Park, 3; 2 Atk. 254; Har. Ch. Pr. 21; Burn on Insurance, 20; Shep. Touch. 58, 59; 1 Burr. 474; Wescot on Insurance, 226; 2 Bl. Com. 458; *Carter v. Boehm*, 3 Burr. 1909; Chitty, 8, 9; 1 Fonb. 122, 230, note, ed. 1805; *Collins v. Blanton*, 2 Wils. 347.

The 5th plea was, that the vessel was captured by the British, and was the property of the enemy of Great Britain; and the 6th plea was, that the vessel was the property of a French citizen, and that there was war between Great Britain and France, and that the vessel was captured by the British, &c.

The answer to these pleas was that the policy covered war risks, there being no warranty that the property was neutral.

Mr. Swann, for the plaintiff, cited *Christie v. Secretan*, 8 T. R. 192; *Barnewall v. Church*, 1 N. Y. T. R. 217, 237.

Mr. E. J. Lee, for the defendant, cited 1 Rob. 11, and *Anonymous*, Skinner, 327, that naming the insured as of Richmond, was an implied representation that the property was neutral.

The COURT (*nem. con.*) decided that the three pleas were all bad; — the fifth and sixth because the risks and persons there stated were covered by the policy. The Court did not give the reasons of their opinion on the 4th plea.

On motion of the plaintiff's counsel, the Court continued the cause until the next term, because the defendants had taken depositions under the Act of Congress, without notice to the plaintiff, which depositions were first opened in court at this term. See

the case of *Dade v. Young & Co.*, in this court at June term, 1803, [*ante*, 123.]

Upon the trial of the issues of fact, at November term, 1807, it appeared that the first plea was general performance, with general replication and issue. The second plea denied the capture and condemnation, as stated in the declaration. The third plea denied the seaworthiness of the vessel. The seventh plea averred the same misrepresentation which was stated in the fourth plea, and averred it to be material to the terms of this contract of insurance; and the issue was joined upon the materiality. The eighth plea was that the plaintiff had no interest in the vessel.

Mr. C. Lee, for the defendants, objected to the plaintiff's reading any of the proceedings of the Court of Vice-Admiralty in Jamaica, except the sentence of condemnation. *Russel v. Union Ins. Co.* 4 Dal. 424.

Mr. Swann, *contrà*, was stopped by the COURT, who said that the point had been decided by this Court in the case of *Croudson & others v. Leonard*, in March, 1806, [*ante*, 291,] and see also, *Lambert & Co. v. Smith*, at November term, 1806, [*post*,] in which last case the COURT decided that the plaintiff might give in evidence to the jury, the depositions and other evidence contained in the proceedings of the Court of Vice-Admiralty, to show that the grounds of condemnation stated in the sentence were not true.

The COURT now said that they did not mean to say that the depositions in the record of Vice-Admiralty were evidence in chief of the facts therein stated, but were only evidence of the real grounds of condemnation, so that the jury may judge of the weight which the sentence ought to have in the question whether the policy was violated by the plaintiff.

Mr. Lee then objected to the policy being admitted as evidence in this action, which is in the name of Straas *alone*, but the policy is in the name of William Hodgson for Straas and others, of Richmond. The suit should have been in the name of Hodgson, the trustee. *Cabell v. Hardwick*, 1 Call, 358; *Peter v. Cocke*, 1 Wash. 257.

Mr. Swann, *contrà*. The plea of performance admits the execution of the policy and all the obligations arising out of it. 4 Bac. Ab. 54; System of Pl. 321; *Grills v. Mannell*, Willes, 380.

The COURT decided that the policy was substantially set forth in the declaration according to its legal effect.

A deposition had been read by the plaintiff's counsel; and *Mr. C. Lee*, for the defendants, offered to read a prior deposition of the same witness, taken informally by the plaintiff and filed, but which the plaintiff had not offered to read in evidence. The defendants waived all objection to its informality, but the plaintiff refused to consent to its being read.

Woods & Bemis v. Young & Co.

The COURT (*nem. con.*) refused to permit the defendants to read it to the jury.

Mr. Swann, for the plaintiff, prayed the Court to instruct the jury that, if the plaintiff was at all interested in the vessel, he has a right to recover the whole sum insured. *Park*, 259, 263, 265, 300, 304; *Lewis v. Rucker*, 2 Burr. 1167; *Grant v. Parkinson*, Perk. 305; *DaCosta v. Frith*, 4 Burr. 1966.

Mr. Lee, *contrà*, cited *Marshall*, 200, 612; *Goddard v. Garrett*, 2 Vern. 269; *Le-Pypre v. Farr*, 2 Vern. 716, 717; *Craufurd v. Hunter*, 8 T. R. 13; *Thellusson v. Fletcher*, Doug. 314.

The COURT decided that upon a valued policy, and a total loss, the plaintiff is entitled to recover the whole sum insured, if he prove that he has a *bonâ fide* interest in the property insured.

Upon the issue on the seventh plea, *Mr. Swann*, for the plaintiff, prayed the Court to instruct the jury, that if the vessel was seaworthy, the misrepresentation was not material to the said contract of insurance.

Mr. C. Lee, *contrà*, cited *Unwin v. Wolseley*, 1 T. R. 674; *McDowall v. Fraser*, Doug. 260; *Collins v. Blantern*, 2 Wilson, 347; *Hayne v. Maltby*, 3 T. R. 438; 1 Wooddeson, 307; *Marshall*, 248; 1 Fonb. 230; *Jenk.* 254; *Bul. N. P.* 173; 2 Vent. 107; *Kent v. Bird*, Cowp. 585; *Hardres*, 464; *Watson v. Rawson*, Cowp. 785; *Carter v. Boehm*, 3 Burr. 1905.

Mr. Swann, in reply, cited *Park*, 206; *Doug.* 271; *McDowall v. Fraser*, Doug. 260; *Marshall*, 335, 336.

The COURT (DUCKETT, J., absent,) refused to give the instruction last prayed by *Mr. Swann*, and the plaintiff became nonsuit. See *Hodgson v. Marine Ins. Co. of Alexandria*, [*post.*]

WOODS & BEMIS v. YOUNG & Co.

The Court will not continue a cause for the absence of a witness, who has been summoned, if no attachment has been moved for, if the witness resides within one hundred miles of this place, although he resides out of this district.

THE COURT refused a continuance, because the plaintiff had not taken or moved for an attachment against his witness, John Wood, who lived at Port Tobacco, out of the District of Columbia, and within one hundred miles of this place; not having decided yet that an attachment will not lie for a witness who resides out of the district, and within one hundred miles. See *Voss v. Luke*, [*ante*, 331]; *Park v. Willis*, November term, 1806, [*post.*]

LAMBERT & Co. v. SMITH & SON.

If the only resident member of a copartnership who are plaintiffs dies pending the suit, the defendant may demand security for costs against the surviving plaintiffs, and the Court will continue the cause to give the defendants an opportunity to lay the rule and give sixty days' notice.

If the blanks in the declaration have been filled up by the plaintiff at the trial-term, and the defendant pleads with a knowledge that they have been so filled up, it is not a ground for continuance of the cause.

LAMBERT died since the last term. Fosdick, the surviving partner, resides out of the district. The defendants moved for a rule on the plaintiffs to give security for costs.

The COURT decided that if the plaintiff did not now give the security, they would continue the cause so as to enable the defendant to give sixty days' notice of the motion, according to the Act of Assembly. See *Thomas v. Woodhouse*, [ante, 341.]

Mr. Swann gave the security required.

Mr. E. J. Lee, for the defendant, contended that he had a right to a continuance, because the plaintiff had filled up a blank in the declaration.

The COURT said it was only ground for a motion to strike out what had been filled up.

It was then stated that defendant had pleaded *non assumpsit* after a knowledge that the blank had been so filled.

The COURT said that that was a waiver of the objection.

Mr. Lee then obtained a continuance on affidavit.

BECK v. JONES.

If a writ of inquiry be set aside at the trial-term, the plaintiff is entitled to a continuance of the cause, until the next term at the defendant's costs.

WRIT of inquiry set aside, and not guilty pleaded at the present term, when the cause was first called for trial. The cause was then postponed without either party having offered ready for trial; when called again for trial, *Mr. Jones*, for the plaintiff, insisted on a continuance. *Mr. Swann*, for the defendant, contended that the plaintiff ought to pay the costs of the postponement.

But the COURT directed the cause to be continued at the costs of the defendant; he being in default until the present term.

McCUTCCHIN v. ANDREW JAMIESON.

The master of an apprentice is concluded, by the recital in the indentures, as to the age of his apprentice.

HABEAS CORPUS, to Andrew Jamieson to bring the body of McCutchin, /whom he claims as an apprentice. The return showed an indenture between the overseers of the poor and Andrew Jamieson, under their seals, in which they state that the boy is nine years old in July, 1794, (the date of the indenture,) and bind him until he shall be twenty-one years old.

Andrew Jamieson, wished to show, by parol evidence, that the boy was only seven years old when bound, and of course had two more years to serve.

The COURT was of opinion that Andrew Jamieson could not, by parol, contradict his seal, and was at law estopped to deny the age. And in equity he had no claim to the further services of the boy, because he saw the boy at the time he took him, and agreed to his age, and expected only twelve years' service from him.

The COURT discharged the boy.

CIRCUIT COURT OF THE UNITED STATES.

OCTOBER, 1806, ADJOURNED SESSION, AT WASHINGTON.

LOVERING *v.* HEARD.

A resident of Alexandria, suing in Washington, must give security for costs.

LOVERING lives in Alexandria. Motion for a rule on the plaintiff to give security for costs.

Granted, after consideration of the laws of Maryland on that subject. Alexandria county is to this county as a separate state, governed by different laws, although under one jurisdiction. Execution will not run from one county into the other. The marshal cannot distrain in Alexandria, for fees due to the officers in Washington county. The modes of collecting fees are different.

Rule granted.

RAY *v.* LAW.

The law of Maryland respecting security for costs and fees does not apply to suits in equity.

IN CHANCERY. A rule had been laid on the complainant to give security for fees and costs.

Mr. Law, for the defendant, now moved that the bill should be dismissed on the rule.

Refused. The Court, on considering the Acts of Maryland on that subject, were of opinion that they did not apply to the Court of Chancery.

ADDISON *v.* DUCKETT AND WIFE.

An answer in chancery is not sufficiently authenticated unless the authority of the justice of the peace, before whom it was sworn, be sufficiently shown.

INJUNCTION. Motion to dissolve. It was objected that the answer does not appear to be sworn, &c., there being no certificate but that of the justice himself, that he was a justice of the peace

Negro Ben v. Scott.

for Prince George's county, in Maryland, at the time he administered the oath. This Court has never gone so far as to admit an answer sworn and certified in this manner. In England, the answer is taken by commission.

The COURT (DUCKETT, J., absent,) refused to consider the answer as sufficiently certified, and refused to dissolve the injunction. The Court cited the cases of *Wright v. West*, [ante, 300,] and *Lloyd v. Lund*, (not reported) at Alexandria, March, 1806; *Watson & Smith v. Tapscot*, Alexandria, March, 1805, (not reported); *Potts v. Ghequère*, Alexandria, March, 1805, (not reported); *Wilson v. Stewart*, Alexandria, June, 1803, [ante, 128]; *Mandeville v. Ringgold*, Alexandria, (not reported); and *Tibbs & Co. v. Parrott*, Washington, June, 1806, [ante 177, 313.]

NEGRO BEN v. SABRET SCOTT.

Upon a petition for freedom the Court will not require the defendant to give security for the wages of the petitioner during the litigation.

BEN had filed his petition for freedom, and a subpœna had issued to the defendant to appear at next term, namely, December term, 1806. He now filed another petition, praying that the defendant may be summoned before the Court to recognize not to carry the petitioner away, &c.; whereupon the COURT ordered a subpœna returnable immediately, to answer to this petition; which the defendant obeyed, and gave the recognizance.

Mr. F. S. Key, for the petitioner, contended that the defendant ought to recognize to pay such sum as the Court should adjudge him to pay to the petitioner for his services from the time of exhibiting the petition until judgment, in case the judgment should be in favor of the petitioner.

But the COURT refused; saying they had no jurisdiction in such a summary way to give damages, and they could not compel the defendant to assent to such a judgment.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1806, AT ALEXANDRIA.

CARNE & SLADE v. ARCHIBALD McLANE.

The Court will not compel a witness to testify against his interest in a cause in which he is interested.

If all the members of a partnership are not named as plaintiffs, the defendant may avail himself of the objection upon non assumpsit.

What a witness says on *voir dire* is not evidence to the jury.

ASSUMPSIT upon a promissory note indorsed by the defendant to the plaintiffs.

Mr. Libby objected to being sworn for the defendants, because interested as a partner with the plaintiffs; and swore upon *voir dire* that he was interested as a partner. The Court refused to compel him to swear contrary to his interest.

The defendant's counsel then objected that the plaintiffs could not recover, because Mr. Libby, being a partner of the firm of Carne & Slade, ought to have been named.

The plaintiffs' counsel, said that the declaration of Libby upon *voir dire* is not evidence to the jury, and the COURT so decided. The defendant then offered evidence to prove that Libby was a partner, and prayed the Court to instruct the jury that, if they should be satisfied, by legal evidence, that he was a partner in the house of Carne & Slade, at the time of the indorsement of the note, the plaintiffs could not recover; which instruction the COURT gave as prayed.

JAMES WOODWARD *et al.* v. SUTTON & MANDEVILLE.

It is not incumbent upon joint plaintiffs to prove that they are joint partners.

ASSUMPSIT for goods sold and delivered. The plaintiffs' witness deposeth that the goods were sold to the defendants by Woodward & Company.

Mr. Jones, for the defendant, having required proof that the plaintiffs were the persons who constituted the firm of Woodward & Company, and having referred to the case of *Tibbs et al. v. Parrott*, [*ante*, 313,] —

 Patterson v. McLaughlin.

Mr. Swann had leave to argue the point again, and contended that the plaintiffs have made a record acknowledgment that they constitute the firm. That it could only be proved by their acknowledgments. Articles of copartnership are only an acknowledgment of the parties. *Watson, 36.*

Mr. Youngs, contra. This declaration would not be conclusive evidence against the plaintiffs in an action against them. If it is a record acknowledgment, it binds them in all cases. The proof is in the power of the plaintiffs, not of the defendants; and the allegations in a declaration must be proved. *James Woodward's* declaration cannot be evidence to prove the others to be partners. If the plaintiffs are not bound to give evidence of the partnership, every man who chooses may bind others to a partnership by bringing an action in their names.

PER CURIAM. As the only evidence of the partnership must be either the declarations or the acts of the plaintiffs themselves, and as each of the plaintiffs has come into Court, and averred upon the record (by the allegation in the declaration) that he is one of the partners, trading under the firm of Woodward & Company, no further evidence of that fact can be required.

The Court in the case of *Tibbs et al. v. Parrott*, gave a naked opinion, that the allegation in the declaration must be proved, but did not say what would be sufficient *prima facie* evidence of the fact.

The defendants took a Bill of Exceptions.

BENJAMIN PATTERSON v. PEGGY McLAUGHLIN, JOSHUA BARNEY, ROBERT HOLLIDAY, and WILLIAM ALLEN.

A *ne exeat* will be granted to restrain an administratrix from removing from this district with the effects of the deceased, before final settlement of her administration account, if her sureties reside out of the district;—but it will not be granted against her surety, a citizen of Maryland, who happens to be found here.

The goods of an intestate cannot be attached by his creditors, nor will a chancery attachment lie against the effects of a resident debtor.

IN CHANCERY. This was a motion to discharge the *ne exeat* and certain chancery attachments, and for restoration of certain goods delivered by Holliday & Allen, to the marshal, under the condition of the order for a *ne exeat*.

The bill states that Charles McLaughlin, late of Georgetown, deceased, was indebted to the plaintiff in nine hundred and ninety-two dollars and upwards, which sum yet remains due and unpaid. That the defendant, Peggy McLaughlin, obtained letters of administration on his estate, from the Orphans' Court, in the county of Washington, in this district. That Joshua

Barney and Joseph Young, both of Baltimore, in the State of Maryland, are her sureties for the faithful administration of the estate; and that she has given no security whatever, within the District of Columbia. That she is about to remove herself from the said district and to settle in the State of Maryland. That the complainant has reason to believe she has fraudulently concealed and embezzled a great quantity of goods and chattels of the decedent to a great value; — and that to defraud the creditors, she and the defendant, Barney, without suffering those goods to be inventoried and appraised, but concealing them from the view of the appraisers, employed a vessel, owned by one Holliday, of Maryland, and of which William Allen is master, to convey the concealed and embezzled goods out of this district, into Maryland. That the goods are now on board the vessel, on the River Potomac, sailing on the voyage to Havre de Grace, or Baltimore, and transporting thither for the private gain of the administratrix and of the defendant, Barney. That so secret have been their proceedings, that it is impossible for any of the creditors to know certainly, or to bring proof in a court of law as to the quantity and value of the said goods, nor of what particular articles they consist, without the interposition of this Court for a discovery thereof. That unless the said goods can be subjected to examination and detention, under the orders of this Court, for the purpose of being applied to the satisfaction of the complainant and other creditors of the deceased, they will lose their demands. It seeks a discovery as to what goods of the deceased have come to the hands of the administratrix or of the defendant Barney, other than those which have been inventoried: What goods of the deceased, or of others, and to whom belonging, were shipped on board of the vessel. It prays that the defendants, Peggy and Joshua, may be restrained by *ne exeat* from departing from the district until a full, fair, and final administration shall be made: That all the defendants may be enjoined and restrained from carrying away the goods shipped on board the vessel, and that Holliday and Allen may be restrained from departing until the said goods shall be surrendered and subjected to due examination and appropriation, under the jurisdiction and orders of this Court. This bill being sworn to, the following order was indorsed by one of the judges of this Court:

“The clerk will issue a writ of *ne exeat* as prayed, restraining the defendants from removing out of the District of Columbia, with the effects within mentioned, unless they give bond with security in the usual form, in the penalty of one thousand nine hundred dollars; or shall deliver up to the marshal the said effects, to be subject to the future order of the Court.”

The answer of Peggy McLaughlin denies that she or the defendant Barney, is personally indebted to the plaintiff, and denies his claim to be just against the estate of her husband. It admits that the defendant Barney, and one Joseph Young, both of Baltimore, in Maryland, are her sureties in the administration-bond, and avers them both to be men of sufficient property ; — that they were accepted by the judge of Orphans' Court, who has the sole jurisdiction as to their sufficiency, and denies the power of this Court to judge thereon, or to require other sureties. It denies that she is about to change her residence, but avers that she only intended to pay a visit to her friends. It denies that she intended to remove out of the jurisdiction of the Court, which has the power to settle the deceased's estate. It denies that she has fraudulently concealed, or embezzled any of the estate, — but avers that she has fairly inventoried the estate according to the best of her knowledge. It avers that the goods on board the vessel were the property of herself, and other persons whom she names. That she has no inventory of those effects. It states that she purchased part of those goods, to the amount of eight hundred and thirty-eight dollars, from Mr. Crawford, who bought them at the sale of the deceased's estate. It again denies the power of this Court to compel further security for the administration of the estate ; and avers that if any waste, fraud, or embezzlement has taken place, there is a clear remedy on her bond already given. It alleges that several creditors, of whom the complainant is one, have filed a libel against her in the Orphans' Court, at Washington, on the ground of the fraud, concealment, and embezzlement, which is the subject of the present bill, and that that court has complete jurisdiction over the subject ; and refers to the proceedings in that court. It further states, that the same creditors have filed a bill on the same grounds in the Circuit Court, in Washington county, a copy of which is referred to. It alleges that although she has sold property of the deceased to a Mr. Crawford, and given him possession, yet she is enjoined from taking his notes with surety, whereby the estate is put to hazard. It avers a design to oppress her by a multiplicity of suits, and by drawing her into different tribunals for the same cause of action.

In the answer to the libel in the Orphans' Court, which is made part of her answer to the present bill, she admits, that in order to be near her relations, she did intend to remove to Baltimore, but not to avoid the settlement of her husband's estate, nor to avoid the process of this Court ; but from the persecutions of her creditors she has changed her mind, and does not now intend to leave the District of Columbia, but means therein to reside, and settle the estate of the intestate.

Patterson v. McLaughlin.

Dec. 17, 1806. CRANCH, C. J., delivered the opinion of the Court. (DUCKETT, J., absent.)

The facts which give jurisdiction to this Court in the present case are : That the complainant is a creditor of the deceased, residing in the District of Columbia. That letters of administration have been granted to the defendant, Peggy McLaughlin, by the Orphans' Court of Washington. That the only sureties for her faithful administration of the estate reside in Baltimore, in Maryland, and out of the reach of the civil authority of this district. That the administratrix, Peggy McLaughlin, was about to remove with the effects of her deceased intestate, out of the District of Columbia, and beyond the reach of its process. That the Orphans' Court of Washington county, although it has exclusive original cognizance of the sufficiency of the sureties upon administration-bonds taken by that court, yet has no power to issue a writ of *ne exeat*, nor any other original process to restrain the administratrix from departing with the goods of the deceased, out of its jurisdiction.

These facts being admitted by the answer, the Court cannot dissolve or discharge the *ne exeat* as to the defendant, Mrs. McLaughlin. The Court sees no ground for a *ne exeat* against Mr. Barney ; if there was any stated in the bill it is removed by his answer. There may be some doubt also as to the power of issuing a *ne exeat* against a citizen of another State. The writ of *ne exeat* being considered as originally founded upon the right of the sovereign or of the State to demand the services of all its subjects.

It is the opinion of the Court, therefore, that the *ne exeat* should be discharged as to him, and as to Holliday and Allen, who, although they were charged by the bill with being concerned in the transportation of the goods so clandestinely attempted to be carried away, yet having voluntarily relinquished the business and delivered up the goods, ought not to be further charged. It is also the opinion of the Court that the order of the judge did not require the marshal to detain the goods, if proper security had been tendered by Mrs. McLaughlin upon the process of *ne exeat*, the effect of the order being to give an option to the defendants to deposit the goods in lieu of other security.

It is therefore ordered by the Court that the said goods, now in the custody of the marshal, be delivered up to the defendant, Peggy McLaughlin, upon her giving a *ne exeat* bond in the usual form, in the penalty of one thousand nine hundred dollars. Those goods are considered as having been voluntarily delivered to the marshal, and being thus in his hands, by virtue of a condition intended for the benefit of the defendants, the Court does not think it right that they should take them back without giving that security for which they were intended as a substitute.

Upon the question respecting the attachments, the Court is of opinion, that the defendant, Mrs. McLaughlin, has a right to appear without security. To require security, would be to evade the rule of law that an administrator is not required to give bail for a debt due from the intestate. To allow the goods of the deceased to be attached, would interfere with another rule of law, which requires the marshalling of assets, and the priority or equality of payment to the creditors of the intestate.

The Court is also of opinion, that the process of chancery attachment will not lie in this court against the effects of a debtor, resident within the District of Columbia. Upon the first hearing of the answer of Mrs. McLaughlin, the Court noticed several expressions in it, which at that time, seemed indecorous and disrespectful towards this Court and its process. It was endeavored, by her counsel, to explain them in such a manner as to show that they ought not to be considered as offensive. But upon a careful perusal of the answer, the Court finds that its first understanding of those expressions was correct; and not to have noticed them, would have implied a carelessness of that self-respect, which it is the duty of every court of justice to maintain.

The first expression alluded to, is that which charges, that the complainant's bill "contains a libel upon the Orphans' Court." Mrs. McLaughlin, or the solicitor who drew her answer, must have known, that the bill had been perused by one of the judges of this Court, before the order for a *ne exeat* was made, and that the judge would not have made such an order, if the bill had been considered as a libel upon that court. Nor has the Court found any thing in the bill which can justify that allegation in the answer. After the bill had been thus sanctioned by a judge's order, the Court cannot but consider the expressions of the answer in that respect as disrespectful.

The other expression alluded to, is that which declares, that the defendant's goods "have been shamefully and wantonly seized by the process of this Court, at the instance and false suggestions of the complainant."

The Court, therefore, directs the clerk to strike out those expressions in the answer of Mrs. McLaughlin. From the respectability of the counsel who has signed that answer, the Court cannot believe that any thing disrespectful to the Court was intended to be sanctioned by him, but is willing to believe that those expressions must either have escaped his notice, or have been understood by him in a manner different from the impression which they have made upon the Court.

Messrs. E. J. Lee, C. Lee, Jones & Hiort, for the plaintiff.

Messrs. Swann, and P. B. Key, for the defendants.

PARK'S ADMINISTRATOR v. WILLIS.

The Court will not permit a deposition taken, *de bene esse*, to be read in evidence, if the witness resides within one hundred miles of the place of trial, although his residence is out of the District of Columbia.

A deposition taken and filed by the defendant, may be read in evidence by the plaintiff, upon proof that the witness is beyond the jurisdiction of the Court.

SPECIAL action on the case — plea, not guilty.

On the trial, the defendant objected to the reading of a deposition, because it did not appear that the witness might not attend personally. The residence of the witness was agreed to be at Fredericksburg, fifty miles only from Alexandria. No subpoena had been issued for him.

The COURT refused to permit the deposition to be read. (See *Voss v. Luke*, July term, 1806, [*ante*, 331]; *Woods & Bemis v. Young*, July term, 1806, [*ante*, 346,] and *Lewis v. Mandeville*, [*post*, 360.]

The plaintiff then offered to read a deposition of John Hand, taken by the defendant, and filed in the cause, after having proved that Hand sailed for Philadelphia about three weeks ago, and had not returned. No subpoena had been issued for him.

The COURT permitted it to be read.

PRESTON v. YOUNG.

If the plaintiff has done part of the work contracted for by an agreement under seal, and is prevented by the defendant from finishing the job, he may recover the value of the work which he has done, in an action of *assumpsit*.

QUANTUM MERUIT for work and labor done, [and materials furnished,] as a carpenter.

The defendant proved a special agreement under hand and seal. The plaintiff offered evidence that he was interrupted by the yellow fever from proceeding with the work, and that before the fever subsided, the defendant employed another person to complete the work. The agreement was as follows:

“Alexandria, July 29th, 1803. Memorandum of an agreement made, &c., that the said James Young doth agree to pay to the said Thomas Preston, \$200, for building the shop as high as my dwelling, and to put in two 12-light frames, lay on 4-4 floor, and finding all the materials, glass excepted. Thomas Preston. [L. s.] James Young. [L. s.]”

The defendant prayed the Court to instruct the jury, that if, from the evidence, it shall appear to them that the work, labor,

and materials were done and furnished by the plaintiff for the defendant, in consequence of said written agreement between the said parties under seal, then this action of assumpsit will not lie.

Which instruction, the COURT refused; but instructed the jury that if they should be of opinion, from the evidence, that the plaintiff was prevented by the defendant from proceeding to complete the work according to the agreement, in a reasonable time, then the plaintiff had a right to recover in this form of action, as much as he deserved to have for his work and materials.

A bill of exceptions was taken by the defendant, and the judgment was reversed by the Supreme Court. 4 Cranch, 239.

The COURT below, was of opinion, that Preston could support his *quantum meruit*, notwithstanding the written agreement. The grounds of that opinion were, that Young, by refusing to suffer the plaintiff to complete the contract, had dissolved the agreement, on his part, so that he could never have sustained an action upon it, against Preston, and if he could not have sustained an action upon it, he could not set it up to defeat the action of the plaintiff. He had treated the contract as at an end, and thereby had authorized the plaintiff to consider himself absolved from its obligation. It is true, the plaintiff was not bound to abandon the contract, and might have brought suit upon it, and compelled the defendant, Young, to pay the whole \$200. But he was not obliged so to do. He was at liberty to waive the contract, and sue upon the implied assumpsit. The defendant, by his own act, had abandoned the contract, and it did not lay in his mouth to insist upon it. A *quantum meruit* is an equitable action, and is more favorable for the defendant than action upon the contract. The case of *Towers v. Barret*, 1 T. R. 133, was considered as having decided the principle that where a contract is put an end to, the plaintiff may recover back what he has advanced upon such contract. So, by analogy, it was inferred, that where labor and materials are advanced upon a contract which is put an end to, the plaintiff may recover the value of such labor and materials. And 1 Powell on Contracts, 417, was relied upon as establishing the principle, that he who prevents another from fulfilling his part of the contract, can never maintain an action against the party who is thus prevented from performing. The Court was therefore of opinion, that Young was, by his own act, bound to consider the contract as entirely dissolved. For although it is said that a contract under seal cannot be dissolved by parol, yet this was not a dissolution by parol, but by matter *in pais*. And where a cause of action arises, partly by deed, and partly by matter of fact to be proved by parol, the damages may be discharged by parol. In *Giles v. Edwards*,

7 T. R. 181, *Ld. Kenyon* said, "This was an entire contract; and as by the defendant's default the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract, and to recover back the money that they had paid under it." *Buller's N. P.* 139. "If in a *quantum meruit* for work and labor, the plaintiff proved he had built a house for the defendant, though the defendant should afterwards prove that there was a special agreement about the building of it, viz.: that it should be built at such a time and in such a manner, and that the plaintiff had not performed the agreement, yet the plaintiff would recover upon the *quantum meruit*, though doubtless such proof on the part of the defendant might be proper to lessen the *quantum* of the damages." In the case of *Atty v. Parish*, 4 Bos. & Pul. 104, the plaintiff did not bring his action upon the ground that the special agreement was at an end, but on the ground of its being in full force, and actually offered it in evidence to support his general count. And the Court of Common Pleas decided agreeably to the indisputable general rule of law, "that wherever the action is founded on a deed, it must be declared upon." In *Cooke v. Munstone*, 4 Bos. & Pul. 351, there was a special count claiming damages for non-performance of a special contract; and a count for money had and received, claiming the money paid in advance upon the contract. The plaintiff, on the trial, proved a different contract from that laid in the special count, and a failure on the part of the defendant to comply with his part of it. It was decided that the plaintiff could not recover on the 1st count, because of the variance; and not on the 2d count, because a special contract, still open and subsisting, was proved on the trial. Both the cases, *Atty v. Parish*, and *Cooke v. Munstone*, fully recognize the law as laid down in *Towers v. Barrett*, 1 T. R. 133, and *Giles v. Edwards*, 7 T. R. 181, viz.: that where the contract is put an end to, the plaintiff may recover for what he has advanced on the faith of the contract; and that if the defendant prevents the plaintiff from performing his part, the latter has a right to put an end to the whole contract. See also *Weston v. Downes*, Doug. 23; *Payne v. Bacombe*, Doug. 651; *Power v. Wells*, Cowp. 818; and *Hunt v. Silk*, 5 East, 449.

DYSON'S ADMINISTRATOR v. THOMAS WHITE, JR.

The costs of continuance await the event of the cause, unless there be a special order to the contrary; an attachment will not lie for non-payment of the costs of a continuance until after a rule to show cause, nor unless there has been a personal service of the order of the Court to pay the costs; nor unless the bill of costs state the particular items.

Mr. Youngs, for the plaintiff, moved for an attachment against

the defendant, for not paying the costs of the last term, (the cause having been continued at his costs,) grounded on a paper signed by the clerk, stating the costs of the continuance in general terms to be, for witnesses' attendance, \$48, and marshal's fees, \$3, without stating who were the witnesses, nor how long they attended, nor for what services the marshal's fees arose; nor did it contain any certificate of the order of the court, or even a copy of the entry respecting the continuance. On the back of the paper was an order from John A. Burford, (the plaintiff's husband,) to pay the money to —, and a memorandum purporting to be signed by the defendant, refusing to pay the bill unless compelled by law.

The COURT refused the attachment, because there did not appear to be a personal service of the order to pay the costs, or of the entry on the minutes, and because the bill of costs did not state the particulars.

The clerk stated that it was not the practice in the Court to issue attachments in such cases, but the costs awaited the event of the cause. It also seemed to be the practice, that a rule to show cause why an attachment should not issue, should be granted.

LEWIS v. MANDEVILLE.

Quære, whether the Court can issue an attachment for a witness residing at Winchester, in Virginia, less than one hundred miles from this place.

Mr. Taylor, for the plaintiff, offered the deposition of Anthony Moore, taken in Alexandria, *de bene esse*, under the laws of Virginia, and stated that the witness was a person employed in transporting the mail, and that his residence is near Winchester, not one hundred miles distant. That he does not know where he now is, but that he is not in the district. A subpoena has been issued and return served.

These facts being admitted, the COURT (DUCKETT, J., absent,) suffered the deposition to be read, not having decided, and being still doubtful whether an attachment can properly issue and run into the State of Virginia, within one hundred miles, but intimated that they would hear an argument in a full Court, on a motion for a new trial, on the ground of admitting improper evidence. *Voss v. Luke*, [*ante*, 331]; *Woods v. Young*, [*ante*, 346]; *Park's Adm'r v. Willis*, [*ante*, 357.]

WRAY v. RILEY.

In Virginia, special bail in an action of debt upon judgment rendered in one of the other States, cannot be required by the indorsement of an attorney.

MOTION by *Mr. E. J. Lee*, to discharge the special bail which had been required by an indorsement of the plaintiff's attorney.

The action was debt on a judgment recovered in the State of Georgia.

Mr. E. J. Lee. The case of judgment is not provided for by the Virginia statute of 12th December, 1792, p. 78, in which bail may be required by an indorsement of an attorney. *Ruffin v. Call*, 2 Wash. 181; *Bidleson v. Whytel*, 3 Burr. 1548; *Belither v. Gibbs*, 4 Burr. 2117; *Bowen v. Barnett*, Sayer's Rep. 160.

Exoneretur ordered. (DUCKETT, J., absent.)

LYLES v. MAYOR & COMMONALTY OF ALEXANDRIA.

The Court will not sign a bill of exceptions, which states that it contains all the evidence in the cause, unless, &c.

THE COURT (DUCKETT, J., absent,) refused to sign a bill of exceptions stating that it contained all the evidence offered in the cause; that fact not appearing to be agreed by the parties, and the Court not being satisfied that the whole evidence was stated.

LAMBERT & Co. v. ALEXANDER SMITH & SON.

The admissions of one of several underwriters upon the same policy, cannot be given in evidence against another underwriter; nor the admissions of a committee of the company, not authorized by the articles of association to make admissions.

Nor can evidence be given by the plaintiff that another insurance company, or other underwriters on the same policy, have paid upon the same risk.

If one party alleges that the other agreed to receive certain papers in evidence, and the fact of such agreement be contested, the Court will not hear affidavits to prove the agreement, and will reject the evidence, if it be incompetent.

The sentence and proceedings of a foreign court of vice-admiralty, condemning the goods as enemy property, are not conclusive evidence of that fact, in a suit upon a policy of insurance. But it is competent and *prima facie*, although not, in itself, sufficient evidence to prove that fact.

The sentence may be invalidated by the evidence contained in the record of the proceedings.

The prayer of an appeal, and the order granting it upon terms, is not evidence that the terms were complied with, or that the appeal was prosecuted.

ASSUMPSIT on a policy on goods on board the brig *Celia*, from

Alexandria to Bourdeaux, and at and from thence to St. Bartholomews, with leave to attempt to get into Guadaloupe; but if, in attempting to get in, they should be warned off, and register indorsed, they should desist from any further attempt. Interest averred to amount of \$6000, at 30 per cent. premium, 25 per cent. to be deducted, if lost on the voyage to Bourdeaux; captured by the British, and lost to the insured. Arrived at Bourdeaux, took there a cargo, and was captured near Guadaloupe, and condemned in the Vice-Admiralty Court in Antigua. The plaintiffs offered parol evidence of conversations with other underwriters than the defendants, on the same policy, and produced the articles of association.

Mr. C. Lee, for the plaintiffs. A conversation between the committee and the insured, is tantamount to a conversation between the plaintiffs and the defendants. A paper admitted by the committee, is as if admitted by the defendants. An application was made to the committee to settle this loss. Shall we not give in evidence what passed between the committee and the agent of the plaintiffs? By the articles, the company is to meet every day. The committee are to examine and report upon claims to the company, who are to consider the same, and if a majority agree that the claim is just, they are to give their notes, &c. The committee are the only means of communication between the plaintiffs and the company. When the company meet, the insured are excluded. The receiving of the plaintiffs' papers by the committee for consideration and report, is an admission of the verity of those papers. By art. 9, they agree to submit to the decision of any one suit. The plaintiffs, therefore, may give in evidence, in this suit, the acknowledgment of any one of the underwriters — *à fortiori* the acknowledgments of the committee, the agents of the whole. If all are to be bound by this suit, then the declarations of Smith & Son (the defendants) would bind all.

Mr. C. Simms, for the defendants. The acts of the committee cannot bind the defendants further than they are authorized by the articles of the association to bind them. A majority of all the underwriters only can bind an absent member. Although they have bound themselves to abide the event of one suit, yet it does not follow that they are all to be bound by the acknowledgments of any one. The plaintiffs may select the strongest case in their favor. The defendants have only agreed to take the risk of an acknowledgment of this one underwriter.

The COURT (DUCKETT, J., not having heard the whole argument, declined giving an opinion,) was of opinion, that no acknowledgment by the committee of the authenticity of papers, can be given in evidence against the defendants, unless the defend-

ants were present, and did not deny it. The committee were special agents of the defendants, for limited purposes, and could only bind the defendants to the extent of their powers.

The plaintiffs offered to prove, that another insurance office had paid upon the same risk.

Refused by the COURT, *nem. con.*

The plaintiff then offered to prove, that other underwriters upon the same policy, had paid their proportions.

Refused, *nem. con.*

Mr. Youngs, for the defendants, objected to evidence being given of a demand made on the committee, or of the time when the claim was made to the committee.

The COURT, without hearing a reply, said there was no doubt that it was competent for the plaintiffs to give that evidence.

The defendants offered to read the record of the proceedings of the Vice-Admiralty Court of Antigua.

The plaintiffs contended, that a certain affidavit annexed to that record, should be read also.

The defendants objected to all but the record.

The plaintiffs then objected to the authentication of the record.

The defendants' counsel offered to make affidavit, that it was agreed between him, as counsel for the defendants, and H. K. May, as agent of the plaintiffs, that the record should be used on the trial.

But the COURT refused to hear such affidavit, and said that they could not admit, as evidence, what was not evidence, unless the agreement was in writing at the time, and entered upon the record. It would require that the Court should decide the fact, whether there was such an agreement, and if they heard affidavits on one side, they must on the other, and there would be no end to the investigation. The parties, however, agreed to admit the record without the affidavit annexed.

Mr. Jones, for the defendants, prayed the instruction of the Court, &c., that the sentence of condemnation as enemy property was conclusive.

But the COURT decided: 1. That the sentence and proceedings in the admiralty were not conclusive evidence that the property was not American. 2. That it was not sufficient, but was competent evidence that it was not the property of American citizens. 3. That it is *prima facie* evidence of that fact. 4. That it is competent for the plaintiffs to adduce the evidence and testimony, as it is stated in the record of the proceedings of the Vice-Admiralty Court, to invalidate the sentence. 5. That the prayer of appeal, and the order granting it upon the usual terms, were not evidence that the appeal was prosecuted, or that those terms had been complied with.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1806, AT WASHINGTON.

HARRISON v. EVANS.

In an action upon the case against the owner of a stage-coach, for taking away the plaintiff's slave, evidence may be given, on the part of the defendant, that the plaintiff had given the slave a written permission to seek a new master, and if such permission be without limitation of time or place, the plaintiff cannot recover. The office-keeper of the defendant is a competent witness for the defendant, because he is liable to the defendant if the plaintiff recovers, and to the plaintiff if he fails to recover, in this suit.

TROVER for a mulatto woman slave, named Nell; with a special count for carrying away the plaintiff's slave, without his consent, whereby she was lost to the plaintiff.

Mr. Jones and *Mr. Morsell*, for the defendant, offered evidence that the plaintiff had permitted the slave to go about and hire herself where she chose.

Mr. W. H. Dorsey and *Mr. F. S. Key*, for the plaintiff, objected.

But the COURT (*nem. con.*) permitted the evidence to be given to the jury. The count for trover was abandoned by the plaintiff's counsel.

Dennison Darling was offered as a witness for the defendant. It had been proved that he was the keeper of the defendant's stage-coach office, and had ordered the driver to call at Mrs. Thompson's and take a servant, who proved to be the slave in question.

It was objected, by the plaintiff's counsel, that he was interested; because if the plaintiff recovers against Evans, Evans could recover against him.

But the COURT (*nem. con.*) overruled the objection because the witness is indifferent. For although if the plaintiff recovers against Evans, Evans may recover against Darling; yet, if plaintiff does not recover against Evans, he may against Darling, so that he would be liable in either event.

The COURT, also, (FITZHUGH, J., absent,) at the prayer of the defendant's counsel, instructed the jury, in effect, that if the slave had a written authority from the plaintiff, without limitation of

Negro Ben v. Scott.

time or place, to seek for a new master, the plaintiff could not recover in this action, although such authority was not shown to the defendant or his agents.

Verdict for plaintiff, \$180. New trial refused.

NALLY v. LAMBELL.

The Court will not grant an attachment against a party for not paying his witness, unless payment shall have been demanded by a person having authority to receive payment, and unless that authority appear.

MOTION for attachment by witness against the person at whose request he was summoned. Affidavit by Spaulding, that he was requested by Nally to demand, and that he did demand payment, which was refused.

The COURT (FITZHUGH, J., absent,) refused the attachment, because Spaulding's authority did not appear.

LINGAN v. MARBURY.

A juror cannot object to serve because he is an alien.

A JUROR objected to being sworn on the petit jury because he was an alien, a North Briton.

The COURT thought it no objection, coming from the juror himself, however it might be if he was challenged by either party.

FITZHUGH, J., absent.

By consent of parties, however, he was not sworn.

NEGRO BEN v. SABRETT SCOTT.

An affidavit is not necessary to continue negro petitions at the first term.

THE COURT will not require in all cases an affidavit at the first term to continue cases of negro petitions.

This cause was continued at the cost of the defendant, as the petitioner offered himself ready for trial; and in general the Court will not insist on a trial at the first term, but if either party offers ready, it shall be continued at the cost of the party not ready. At the second term the Court will require a trial unless good cause be shown on affidavit.

HODGSON & THOMPSON v. MOUNTZ, KNOWLES and another.

The mayor of Georgetown may, in that town, do any act which a justice of the peace of the county can do.

A judgment against two, may be superseded by one of the defendants, and the new confession will bind him and his sureties; and the other defendant need not be named in the *supersedeas*.

The six months' stay is reckoned from the day of the confession of the new judgment. The sum confessed need not be repeated and specially set forth in the blank at the end of the *supersedeas*.

Parol evidence may be given that the confession was made at a place within the jurisdiction of the magistrates before whom it was made.

UPON the return of a *ca. sa.* issued upon a *supersedeas*, —

Mr. Morsell and *Mr. F. S. Key*, for the defendant, moved the Court to quash the execution. 1. Because the law of Maryland, 1791, c. 67, § 1, requires that the confession of judgment shall be made before two justices of the peace of the county, but this confession was made before the mayor of Georgetown, and one justice of the peace of the county only. 2. The original judgment was against Jacob Mountz and George Reintzel; and it is superseded by Mountz only. 3. The original judgment is misrecited in the *supersedeas*, the original judgment being against both and the *supersedeas* stating that it was a judgment against one. 4. That the six months' stay is to be reckoned from the day of the original judgment, but the *supersedeas* reckons it from the day of the date of the *supersedeas*, that is, the day of confession of the new judgment. 5. That the blank, at the end of the *supersedeas*, ought to be filled up with the actual sum to be paid. 6. That it does not appear, upon the *supersedeas*, that the judgment was confessed in Georgetown, so as to be within the jurisdiction of the mayor, and that parol evidence cannot be now given of that fact.

But the COURT, after argument, overruled all these objections, and refused to quash the execution.

Mr. Jones, for the plaintiff.

BROHAWN v. VAN NESS.

A rule-security for fees is not of itself a sufficient ground for a rule-security for costs. If upon cross-examination it appears that the witness is interested, the Court will instruct the jury that his testimony is not evidence.

A lease for ninety-nine years, not acknowledged and recorded, is not good for seven years; but is evidence of the rate of renting, in an action for use and occupation.

Damages for use and occupation may be set off.

A RULE on the plaintiff to give security for fees had been laid at the last term. When the cause was called for trial, —

Mr. F. S. Key, for the defendant, moved for a rule on the plaintiff to give security for costs, and contended that the rule for fees was *prima facie* evidence that the plaintiff did not reside within the District of Columbia.

But the COURT (DUCKETT, J., absent,) did not think it sufficient ground to lay to the rule. The fact of the non-residence of the plaintiff was afterwards proved by the written affidavit of a witness, and security given upon the trial.

S. Speake, was sworn in chief for the plaintiff.

Mr. F. S. Key, for the defendant, before *Speake* was examined, prayed that he might be sworn on the *voir dire*.

The COURT said the rule was that, although sworn in chief, if it appeared on the examination that the witness was interested, the Court would instruct the jury that the testimony is not evidence.

The defendant offered to offset rent due on a lease for ninety-nine years, not acknowledged or recorded according to law.

The plaintiff objected to the paper being given in evidence, until the defendant shows that the plaintiff was in possession, and contended that it was void.

Mr. F. S. Key, for the defendant, contended that it was good for seven years. By the Act of Assembly, 1766, c. 14, it is enacted that no estate for more than seven years shall pass or take effect unless the deed be acknowledged and recorded, &c., thereby implying that it may be good for seven years, although not acknowledged, &c., and it does not say that the deed shall be void.

Mr. Morsell and *Mr. Dorsey*, for the plaintiff, contended that this paper is not a lease; but only an agreement to make a lease at a future time, and that the Act of Assembly, makes void all deeds intending to pass a greater estate than for seven years, otherwise a deed in fee would be good as a lease for seven years.

The lease was not under seal, nor acknowledged, nor recorded, nor was possession under it proved. It begins: "It is this day agreed between, &c., as follows, namely, the said J. P. Van Ness agrees to lease, to the said I. B., Lot No. 4, &c. in square No. 295, &c., for ninety-nine years, at the rate of two dollars annually for every front foot towards the canal, which said front is fifty feet five inches. The said rent to be paid annually. The first payment to be made on the 29th of March next; the said I. B. is to have the privilege of purchasing at any time within three years at the rate of fifteen cents a square foot. [Signed] J. P. Van Ness, I. Brohawn. Attest: S. Speake."

The COURT (CRANCH, C. J., doubting,) said it could not operate in law as a lease for seven years; but would be good evidence of the rate of rent in an action for use and occupation.

Mr. Jones, for the defendant, then prayed the Court to instruct

the jury, that if they shall be satisfied, by the evidence, that the plaintiff took possession of the lot under the lease, then in law, the plaintiff was tenant at will of the defendant, and if no rent has been paid, the defendant has a right to set off one year's rent against the plaintiff's demand in this action, and that the lease may be given in evidence to show the amount of that rent. No objection was made against offsetting rent as a general principle.

The opinion was given by the COURT as prayed. (DUCKETT, J., absent, and CRANCH, C. J., doubting.)

KROUSE v. ROSS.

A tenant, who has erected a wooden shed upon posts inserted two feet into the earth, has a right to remove it during the term.

SPECIAL action on the case by a landlord against his tenant for removing a wooden shed during the term, which the defendant had erected during the term upon posts inserted into the ground to the depth of two feet, and leaning against the wall of a house situated on an adjoining lot not belonging to the plaintiff.

Mr. Jones, for the defendant, contended that it was a general rule that, between landlord and tenant, things annexed by the tenant to the freehold or building, and which can be removed without prejudice to the freehold or building, may be lawfully removed by the tenant during his term; and cited the Testamentary Law of Maryland, 1798, ch. 101, c. 7; 6 Bac. Ab. 482; Buller's N. P. 34; *Lawton v. Lawton*, 3 Atk. 14; *Fitzherbert v. Shaw*, 1 H. Bl. 258; *Penton v. Robart*, 2 East, 88; *Dean v. Allalley*, 3 Esp. Rep. 11; *Ex parte Quincy*, 1 Atk. 477.

Mr. F. S. Key, *contra*, contended that the rule was relaxed only in three cases. 1. Where the thing fixed was once a chattel and must be used as such. 2. Where it is for the benefit of trade. 3. Where it is the manifest intention of the parties that it should not be considered as annexed to the freehold. Thus trees may be removed by a gardener or nursery-man for the benefit of trade. The cases cited are exceptions to the general rule of law.

The COURT (DUCKETT, J., absent,) instructed the jury that if the defendant, during his term, brought the old wooden stable, and fixed it on the lot by posts inserted in the ground and leaning against the wall of a house on an adjoining lot, not belonging to the plaintiff, and before the expiration of the term removed the stable, without injury or damage to the soil or to the other buildings of the plaintiff, either by the erecting or continuance or the removal of the stable; it was lawful for him so to do. The plaintiff became nonsuit.

GILLIS, Executor of Stanly Byus, v. VAN NESS.

If the defendant receive the proceeds of the plaintiff's note, discounted with the defendant's indorsement, the plaintiff cannot recover the amount unless he has paid and produces the note, or accounts for its non-production.

ASSUMPSIT for money lent and for money had and received, and *insimul compulasset*. The evidence relied upon by the plaintiff was a receipt in these words, viz. :

"Received of Mr. S. Byus one hundred dollars which I am to repay him, and which, together with two hundred dollars received of, and receipted to him before, makes the amount of a note indorsed by me and discounted in Bank of Columbia yesterday. John P. Van Ness. Jan. 27th, 1804."

The COURT (*nem. con.*) said, the plaintiff cannot recover upon that receipt unless he shows that he has taken up the note, and produces it, or accounts for its non-production.

UNITED STATES v. HENRY PORTE.

If a statute makes it felony to steal the notes of any particular incorporated bank, the statute, by which that bank was incorporated, thereby becomes a public statute.

An indictment upon the Maryland Act of 1793, c. 35, making it felony to steal the notes of any bank established by a charter from the government of the United States, or of some individual State of the United States, must state of what bank the notes were, and whether incorporated by the United States or by an individual State. It is not sufficient to make the averment in the terms of the act.

INDICTMENT, upon the Maryland Statute of 1793, c. 35, for stealing bank-notes, charging the prisoner with stealing the "notes of some bank established by a charter from the government of the United States or of some individual State of the United States."

Mr. Morsell, for the prisoner, prayed the Court to instruct the jury that they must be satisfied, by the evidence, that the notes were of some bank having a charter from the United States, or from some particular State; that the act of incorporation, or charter of such bank must be produced properly authenticated; and that the statute-book is not sufficient evidence of a private statute.

Mr. Jones, for the United States, admitted that the jury must be satisfied by the evidence that the notes stolen were the notes of some bank incorporated, &c., but contended that, as in this country charters could only be granted by a legislative act, they were public laws, of which the courts were bound to take notice.

The COURT (*nem. con.*) was of opinion that the supplementary

 Negro Moses Burr v. Dunnahoo.

act of April, 1792, c. 1, making it felony to steal the notes of the Bank of Baltimore, makes the original act of incorporation (1790, c. 5,) a public statute.

Verdict, guilty. But, upon motion,

The COURT arrested the judgment, because the indictment did not state of what particular bank the stolen notes were, nor whether the bank was incorporated by the United States, or by a particular State. (DUCKETT, J., absent.)

 MINCHIN v. DOCKER.

A free black man, born of a white woman, is a competent witness against a white man. Evidence that a black man has, for many years, publicly acted as a free man, and been generally reputed to be free, rebuts the presumption of slavery arising from color, and is evidence that he was born of a white woman.

SLANDER. Charles Cavender, a black man, was admitted to testify for the plaintiff, after witnesses had been examined by the Court on oath, and testified that Charles had acted publicly for eleven years as a free man, and was generally reputed as such.

DUCKETT, J., said that persons born free, that is, descended from a white woman, were not, in Maryland, held to be negroes; and were permitted to testify against white persons. And although color is *prima facie* evidence of slavery, yet the fact that the witness had, for a long time, publicly acted as free, turned the presumption the other way, and was *prima facie* evidence that he was born of a white woman.

CRANCH, C. J., concurred. (FITZHUGH, J., absent.) See the Acts of Assembly of Maryland, 1717, c. 13, § 2, and 1796, c. 67, § 5.

 NEGRO MOSES BURR v. PATRICK DUNNAHOO.

A slave, coming from Virginia into Maryland more than a year after his master, and sold, is entitled to freedom under the Statute of Maryland, 1796, c. 67.

PETITION FOR FREEDOM. 1st. Ground: Brought into Maryland contrary to law. 2d. Sold contrary to law.

Mr. Caldwell, for the petitioner, relied on the Act of Maryland, 1796, c. 67, and that he was brought in for sale. The evidence was that the negro came from Virginia to Mr. Nourse, more than

one year after Mr. Nourse came here, and was sold by Mr. Nourse to the defendant Dunnahoo.

Verdict for the petitioner.

UNITED STATES v. WILLIAM SHORTER, a Free Negro.

A slave is a competent witness for a free black man on a criminal prosecution.

INDICTMENT against a free black man. The traverser offered a slave as a witness. Admitted, upon the authority of *United States v. Negress Terry* at the last term, [ante 318.] (DUCKETT, J., absent.) See the Acts of Assembly of Maryland, 1717, c. 13, § 2, 3.

Verdict, not guilty.

UNITED STATES v. JEREMIAH JOHNSON.

The Court will not ask a juror, before he is sworn, whether he has formed and delivered any opinion as to the case; but leave the party to challenge for favor.

A witness is not competent to testify as to the similitude of handwriting, who has only seen, for a few minutes, papers acknowledged by the defendant to be in his handwriting.

INDICTMENT for forging a check on the Office of Discount and Deposit at Washington, the said office being a bank established under a charter from the government of the United States. The indictment was under the Act of Maryland, November, 1797, ch. 96, § 2.

Mr. F. S. Key, for the defendant, requested that the jurors might be asked whether they had formed and delivered any opinion upon the case.

The COURT (DUCKETT, J., absent,) refused to suffer the question to be asked, saying, that if the defendant wished to challenge the jurors for favor he might do so.

Mr. Alexander, a witness for the United States, upon being asked by the Court what knowledge he had of the handwriting of the prisoner, said that he had, as a justice of peace, seized a book of accounts, which the prisoner acknowledged to be in his handwriting; that he examined the handwriting in the book, which he had in his possession only about fifteen minutes; that he also saw, in *Mrs. Cassin's* possession, a piece of writing which the prisoner acknowledged to be his; and had, since the prisoner was confined in jail, received two notes from the prisoner; that his only knowledge of the prisoner's handwriting was derived from those circumstances; that he could only swear that the check was like what he had seen.

Mecklin v. Caldwell.

Mr. Key and *Mr. Dorsey* objected to this testimony, and cited *M'Nally*, 417, (Yates's opinion;) and *Peake's Evidence*, 67.

Mr. Jones, contra, cited *Esp. N. P.* 144; 1 *Bl. Rep.* 384.

The COURT said that *Mr. Alexander's* testimony was not evidence of the handwriting of the prisoner.

Verdict, not guilty.

Ex Parte MARIANNE PIC.

Naturalization of *feme covert*.

Mrs. Pic, a *feme covert*, was admitted to be naturalized.

McLAUGHLIN'S ADMINISTRATRIX v. RICHARD JOHNS.

Affidavit of administratrix to hold to bail.

AFFIDAVIT of administratrix, "that the above account is truly extracted from the books of the deceased, and that she believes the same to be a just and true account, and that since the death of the intestate she has received no part thereof," held sufficient to hold to bail — (*nem. con.*)

JOLLY v. RANKIN.

Bail.

THE plaintiff's affidavit was that a certain sum, charged as the balance, "is just and true, to the best of his knowledge and belief," held not sufficient to hold to bail — (*nem. con.*)

MECKLIN v. CALDWELL.

Bail.

ASSAULT AND BATTERY. Affidavit of the fact, but not of any amount of damage; held not sufficient to hold to bail — (*nem. con.*)

United States v. Bollman and Swartwout.

UNITED STATES v. ISAAC BUTLER.

Assault and battery of a slave is an indictable offence.

INDICTMENT for beating a woman of color (a slave) to her damage, and against the peace and dignity of the government of the United States.

Mr. Hamilton, for the traverser, contended that beating a slave was not an indictable offence.

CURIA, contra. The property which a man has in a slave is not of the same nature as his property in a horse. It is only a right to his perpetual service.

UNITED STATES v. DENNIS LONG.

Upon an indictment for assault and battery of a constable, in the execution of his duty in serving a warrant, parol evidence of its contents cannot be given, unless it be lost or destroyed, &c.

INDICTMENT for assault upon a constable, in the execution of his duty. The United States proved that the warrant had been given by the constable to one John Palmer, who was not summoned as a witness.

The Court refused to suffer parol evidence to go to the jury, of the contents of the warrant, as there was not sufficient evidence to raise a presumption that it was lost, or could not be had. See *U. S. v. Pignel*, [*ante*, 310]; *U. S. v. Lambell*, and *U. S. v. Wary*, [*ante*, 312.]

UNITED STATES v. ERICK BOLLMAN AND SAMUEL SWARTWOUT.

This Court will issue a bench-warrant against a person charged with treason, upon *ex parte* affidavits, before any presentment or indictment made or found by a grand jury; and, when arrested, will commit him to the prison of this Court, without stating when or where he is to answer for the offence.

Upon an application for a bench-warrant on a charge of treason as well as upon a motion to commit for the same cause, messages from the President of the United States to Congress may be read.

An attachment for not returning a writ of *habeas corpus* at the appointed time, will not be issued until three days shall have expired after the service of the writ.

Upon the motion to commit for trial, the party accused may be heard by counsel.

JANUARY 23, 1807. *Mr. Jones*, the Attorney of the United States for the District of Columbia, moved the Court to issue a bench-warrant upon a charge of treason against Erick Bollman

and Samuel Swartwout, who had been brought, by a military force, from New Orleans, and detained here under a military guard. This motion was founded upon the affidavit of General Wilkinson, made in New Orleans, and a printed copy of the President's message to Congress of the 22d of January, 1807. (See 4 Cranch, App. Note A.)

Mr. Jones stated that he made the motion in obedience to instructions received from the President of the United States, whose wish was that they should be surrendered to the civil authority.

Mr. Jones, in support of the motion for a warrant to arrest the prisoners upon the charge of treason, contended that, although the ultimate object of the contemplated expedition might be the conquest of the Spanish province of Mexico, yet if it was also intended to seize and plunder New Orleans to supply the means of accomplishing the ultimate object, such intent would be treasonable, and the embodying and marching of a military force, with that intent would be an overt act of levying war against the United States. And that if the prisoners, with a view to carry that intent into effect, endeavored to seduce the commander of the United States troops, they were confederates, and liable as principals in the treason, although they themselves should not have personally committed any overt act of levying war.

Mr. Jones, having read the President's message without any objection by the court,—

CRANCH, C. J., expressed a doubt whether the message did in fact announce a levying of war, and if it did, whether the Court could proceed in any manner upon such information, without violating the 6th article of the amendments to the Constitution of the United States, which declares that no warrants shall issue but upon probable cause supported by oath or affirmation.

Mr. Jones observed that the message announces the actual assemblage of one hundred to three hundred men, and their descent of the river towards the place of their destination; the preparation of warlike stores; and above all it announces that the President has called forth the militia to suppress this enterprise. The calling forth of the militia by the President implies a levying of war against the United States, for he is only authorized to call it forth in case of actual invasion or insurrection. As to the admissibility of the President's message, he observed, that it was not offered as evidence upon the trial, but merely as a matter of public notoriety, of which the court might take notice, and *prima facie* presume the existence of such a state of things for the preliminary purpose of issuing a warrant or other process initiative to a prosecution by indictment. Such information is probable cause, and having been given to Congress by the President, in the discharge of his official duty, is upon oath.

The COURT, having some doubt as to the nature of the offence, as it appeared in the affidavit of General Wilkinson, took time until the next day to consider.

On Saturday, the 24th of January, *Mr. Caldwell*, in behalf of the prisoners, filed a petition for a *habeas corpus*, stating that they were confined in the city of Washington, at the marine barracks, under a military guard, without just and legal cause, and deprived of the benefit of counsel, or being confronted with their accusers, or of being informed of the nature of their offence; or of the cause of their commitment. This petition was opposed by *Mr. Jones*, on the ground of its collision with the motion for a warrant of arrest, which was still pending, and which, if granted, would produce the same effect as the *habeas corpus*.

CRANCH, C. J., stated the opinion of the Court to be that, in strictness, before a right existed, to claim a writ of *habeas corpus*, a copy of the commitment should be produced, or an affidavit that it had been demanded and refused, according to the requisition of the *habeas corpus* act of 31 Car. 2, which the courts have considered as a proper rule to follow in such cases.

Mr. Caldwell, afterwards, on the same day, made affidavit that he had called on Colonel Wharton, the commandant of the marine corps, and requested a copy of the warrant or cause of commitment, who replied that he had no warrant of commitment, but that the prisoners were delivered in the usual military mode, and that they were merely under his care for safe keeping.

Mr. Caldwell stated that he had not seen *Mr. Bollman*, and should then apply for a *habeas corpus* for *Mr. Swartwout* only.

The COURT ordered the writ returnable on Monday, the 26th of January, at 1 o'clock, P. M.

On Monday, the 26th of January, the *habeas corpus*, which was ordered on Saturday, not being returned at the time appointed, namely, at 1 o'clock this day, —

Mr. Caldwell moved for an attachment, and cited the case of *The King v. Winton*, 5 T. R. 91, that the court will grant an attachment immediately for want of a return to the first writ. 6 Bac. Ab. 602, tit. *Habeas Corpus*; 3 Tuck. Blackstone, 135, and *Rex v. Wright*, Str. 915.

Mr. Jones, *contra*. If the writ be returnable "immediately," yet a reasonable time must be allowed to write the return. If the statute of 31 Car. has altered the practice by giving an attachment in the first instance, it has altered it also by allowing three days (after service) for making the return. No contempt is intended by Colonel Wharton, for he (*Mr. Jones*) was occupied on the 25th in assisting him in writing the return, which is not yet finished.

The COURT (*nem. con.*) was of opinion that although the prac-

tice at common law, before the statute of 31 Car. 2, was that an *alias* and *pluries* should issue before an attachment, yet that the practice since the statute has been to issue an attachment without an *alias* and *pluries*, in cases not within the statute. That this practice has been founded upon the statute, the judges having considered it as furnishing a good rule of proceeding in all cases; and that in adopting the statute as a guide in one respect, viz., in dispensing with the *alias* and *pluries*, they also adopted it as a rule in regard to the time of return, viz., in allowing three days to make it; and that, therefore, in the present case, an attachment ought not to be issued until the expiration of three days after the service of the writ.

On the 27th of January, the COURT (CRANCH, C. J. *contrà*,) was of opinion that a bench-warrant should be issued to arrest Erick Bollman and Samuel Swartwout, on the charge of treason.

CRANCH, C. J., said: "I differ from the majority of the Court in that opinion, because I do not think that the facts before us, supported by oath, show probable cause to believe that either Dr. Bollman or Mr. Swartwout has levied war against the United States."

On the 29th of January, *Mr. Jones* moved that the prisoners, who were now brought in upon the bench-warrant, should be committed for trial upon the charge of treason.

Mr. Rodney, the Attorney-General of the United States, objected to the prisoners being heard by counsel, to show cause why they ought not to be committed. He said he objected to it upon principles of humanity, because it would excite a public prejudice against them, if they should be committed after being heard by counsel. The 4th and 8th articles of the amendments of the Constitution guaranteed to them an impartial trial. It would be a usurpation, by the Court, of the province of the jury. It would be an innovation upon the common practice of the country. This preliminary proceeding is always *ex parte*. The prisoners might with as much propriety insist on being heard before the grand jury. *Respublica v. Shaffer*, 1 Dallas, 236.

Mr. C. Lee, *contrà*: To deny a man to be heard by counsel is to deny him a hearing. By the eighth article of the amendments of the Constitution of the United States, in all criminal prosecutions, the accused has a right to the assistance of counsel for his defence. It is a serious injury to an innocent man to be committed to prison on a charge of treason. He ought to be permitted to show that, in law, the facts proved do not amount to treason; and that the offence is bailable. In *Hamilton's case*, 3 Dal. 17, upon *habeas corpus*, it appeared that he was the only one of the insurgents who had been committed without a hearing, and the

Attorney-General endeavored to excuse it by the state of the country, and the urgency of the occasion. It would indeed be a great innovation if the prisoners should not be permitted to be heard by counsel. If their counsel can be heard they will contend that the prisoners ought not to be committed at all; and that if they are guilty of any offence, it is bailable.

Mr. Rodney, in reply, lamented the unfortunate situation of the intrepid rescuer of La Fayette, &c., and contended that the Court ought not to shut their eyes to the executive communication.

The COURT permitted the prisoners to be heard by counsel, although FITZHUGH, J., and DUCKETT, J., doubted, as the general practice was to commit in the absence of counsel; but as this was an important case, and a new question (at least no authority had been cited where an accused person had been denied this privilege,) they inclined to the side of lenity.

CRANCH, C. J., had no doubt upon the question.¹

¹ The following note appears in Judge FITZHUGH's note-book.

"The grounds of doubt of N. F. and A. B. D., were, That the inquiry for the purpose of committing is different from that to convict. A probable cause to believe that the party is guilty, if supported by oath or affirmation, will justify commitment. This inquiry is to be before a court, and not a jury. This is, therefore, not the stage when the Constitution gives him the privilege of counsel as a matter of right, and this may be inferred from comparing the 7th and 8th articles of amendments to the Constitution.

"By the 7th article, 'No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger,' &c. By article 8th, 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, &c., and to have the assistance of counsel for his defence.' These two articles, evidently, cannot apply to the stages of prosecution previous to the impanelling a grand jury, and consequently the personal rights secured by them can extend only to the cases embraced by those articles.

"The counsel for the prisoners have not contended that the Court should now call in the aid of a grand or petit jury, to ascertain their guilt or innocence; and yet the crime with which they are charged is capital and highly infamous. If the Constitution does not apply, it is a case unprovided for and is left as it stands by the State laws and practice, and the laws and practice in England. As far as a deduction can be drawn from practice, it is directly opposed to the present application; and no statutory provision on the subject is recollected; nor have the counsel mentioned any. The parties are not now on their trial, nor (in the language of the article cited) are they called upon to answer; but the object of the inquiry is, whether their conduct has been such as would justify the impanelling a grand jury. But if this dilatory mode of proceeding was to prevail, public inconvenience might arise. An accused person would evade even an arrest, by employing counsel to protract the time of a justice, or of the court in attempting to prove that they have no right to issue a warrant; or after arrest there would be frequent opportunities to escape if several days might be consumed in discussing the propriety of discharging, admitting to bail, or committing, and this too in offences of the blackest die and where bail is not allowable. In this case the Court have issued a bench-warrant to arrest the accused, grounded on an affidavit, in preference to *viâ voce* testimony; and no doubt was intimated by the bench or the bar; and yet, if the 8th article of the Constitution applies, they should have been confronted with the witnesses against them. From all which we infer that the persons accused are

Mr. C. Lee and *Mr. F. S. Key*, for the prisoners, contended that the President's communications to Congress, although made in the discharge of his official duty, are not evidence to criminate any person in a court of justice. The Court must draw its own inferences from facts stated upon oath. This Court is in possession of all the facts which the President had before him. This appears from the message itself. But the message itself does not expressly aver that treason has been committed, nor state facts which amount to treason. In all the evidence laid before the Court, (the messages of the President of the 22d and 28th of January, 1807, the affidavits of Wilkinson, Donaldson, Eaton, Meade, and Wilson,) it does not appear that any person has seen any armed force, any military array, or any embodying and march of troops, or any other overt act of levying of war against the United States; nor is there any evidence of an intent to commit treason. If the projected scheme was to invade Mexico, and for that purpose to seize and plunder New Orleans, and hold it for a short time, and then to give it up to the United States, and to seduce the commander of the United States army to engage in a foreign expedition, it would not be treason. If the prisoners are guilty of any offence, where are they to be tried? No treason is proved; no overt act committed in any place. They have committed no offence here. This Court cannot try them. In what Court shall they be bound to appear? If it be doubtful whether any treason has been committed, the prisoners are entitled to bail.

Mr. Jones and *Mr. Rodney*, for the United States, contended that the President's message was evidence of matters of common report, and furnished probable cause. And although the affidavits do not show that war had been levied, yet that defect is supplied by the message, which, being an official message, was under oath, and proved the treasonable intent of seizing upon New Orleans, and that war had been levied; and they relied upon the deposition of General Wilkinson to prove that the prisoners were confederates in the treason. They contended that if the prisoners were guilty of any crime, it was treason, and that therefore they ought not to be admitted to bail.

January 30th. CRANCH, C. J., delivered the following opinion.

It is the opinion of a majority of the judges that Erick Bollman and Samuel Swartwout should be committed for trial for the crime with which they are charged. It is also the opinion

not entitled to those privileges to which they are in a more advanced stage of the trial, when innocence or guilt is to be decided by a jury. However, if it is the wish of Dr. Bollman and Mr. Swartwout to be heard by counsel, we have no strong objections, as it will be the most orderly and decent way of conducting the inquiry.¹²

of a majority of the judges that they should not be admitted to bail at present.

Upon the motion heretofore made to this Court, by the Attorney of the United States, for a warrant to arrest Dr. Bollman and Mr. Swartwout upon the charge of treason against the United States, I thought myself bound to dissent from the opinion of my brethren on the bench, because I did not think that the facts before us, supported by oath or affirmation, showed probable cause to believe that either of the prisoners had levied war against the United States. After further deliberation, and a more mature examination, both of the evidence and the law, my doubts are very much confirmed.

In times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives. We ought to be upon our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the Constitution; for although we may thereby bring one criminal to punishment, we may furnish the means by which an hundred innocent persons may suffer.

The Constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude. Whenever an application is made to us in our judicial character, we are bound, not only by the nature of our office, but by our solemn oaths, to administer justice, according to the laws and Constitution of the United States. No political motives, no reasons of state, can justify a disregard of that solemn injunction. In cases of emergency it is for the executive department of the government to act upon its own responsibility, and to rely upon the necessity of the case for its justification; but this Court is bound by the law and the Constitution in all events. When, therefore, the Constitution declares that "the right of the people to be secure in their persons" "against unreasonable seizures," "shall not be violated," and that "no warrants shall issue but upon probable cause, supported by oath or affirmation," this Court is as much bound as any individual magistrate to obey its command.

The cause of issuing a warrant of arrest, is a crime committed by the person charged. Probable cause, therefore, is a probability that the crime has been committed by that person. Of this

probability the Court or magistrate issuing the warrant must be satisfied, by facts supported by oath or affirmation. The facts therefore, which are stated upon oath, must induce a reasonable probability that all the acts have been done which constitute the offence charged. The question whether a crime has been committed is a question partly of law and partly of fact. What acts constitute the crime, is a question of law. Whether those acts have been done, is a question of fact. The crime charged, in the present case, is treason against the United States.

The question of law is, what acts constitute that crime? The third section of the third article of the Constitution of the United States, says, that "treason against the United States shall consist only in levying war against them, or, in adhering to their enemies, giving them aid and comfort." As it is not contended that the prisoners are guilty under the second clause of the definition, if guilty at all, it must be of treason in levying war against the United States. To a man of plain understanding it would seem to be a matter of little difficulty to decide what was meant in the Constitution by levying of war; but the subtleties of lawyers and judges, invented in times of heat and turbulence, have involved the question in some obscurity. It is not my intention, at this time, to say how far the expression ought to be limited, nor how far it has been extended. It is, however, to be hoped, that we shall never, in this country, adopt the long list of constructive treasons invented in England, by the worst of judges in the worst of times. It is sufficient to say that the most comprehensive definition of levying war against the King, or against the United States, which I have seen, requires an assemblage of men, ready to act, and with an intent to do some treasonable act, and armed in warlike manner, or else assembled in such numbers, as to supersede the necessity of arms. The advocates for the prosecution have not, as I understand, contended for a more unlimited definition than this.

It is unnecessary, and perhaps would be improper, for me, at this time, to say more on the question of fact, than that, in my opinion, there is no probable cause, supported by oath or affirmation, within the meaning of the Constitution, to charge either Dr. Bollman or Mr. Swartwout with treason, by levying war against the United States. From some of the doctrines urged on the part of the prosecution, I must, most explicitly, declare my dissent. I can never agree that executive communications not on oath or affirmation, can, under the words of our Constitution, be received as sufficient evidence in a court of justice, to charge a man with treason, much less to commit him for trial. If such doctrines can be supported, there is no necessity of a suspension

of the privilege of the writ of *habeas corpus*, by the authority of the legislature. As it is admitted that such communications can not be evidence on the trial, and as an opinion on that point, therefore, cannot be considered as prejudging any question which can occur in a subsequent stage of the prosecution, I have thought proper to be thus explicit on that point. To have said less, I should have deemed a dereliction of duty.

DUCKETT, J., delivered his opinion to the following effect.

He should not make many observations, in addition to what he had remarked on granting the District Attorney's motion for a warrant to arrest the prisoners on the charge of treason. Nor should he make any professions of scrupulous attachment to the right of personal liberty in the citizens of our country; because, if the whole tenor of his conduct through life had not evinced such attachment, he felt assured that no professions on his part could, on this point, secure the confidence of the public. He concurred in the sentiment, that no reasons of state, no political motive, should be suffered to influence, in the slightest degree, the decision of the present question; but while, on the one hand, a due regard should be paid to the right of personal liberty in the citizen, we should not be entirely forgetful of the duty we owe to the public, of preserving the Constitution and government of the country. That on the question then before the Court, he would observe, as he had done when the warrant issued, that he would at that time give no opinion as to what constituted a levying of war within the definition of treason in the Constitution of the United States. That it appeared to him unnecessary, if not improper to do so, as he might be called upon to decide the law, in reference to the facts that might appear on the trial of the prisoners. That the only question then to be decided was, whether there was probable cause, supported by oath or affirmation, as required by the 6th article of the amendments to the Constitution, to induce a belief that the prisoners were guilty of the crime for which they had been arrested. This question, he said, had been deliberately considered by the Court, before the warrant issued, and he thought every thing in this inceptive state of the business, was regularly an *ex parte* proceeding; he, therefore, had been against permitting counsel to argue on any question, except whether the offence was bailable, and whether, under the circumstances, the Court, in their discretion, ought to bail. They had, however, been allowed to argue, in effect, to the utmost latitude, against the propriety of having issued the warrant. To this argument he had given the strictest attention, and could observe with Mr. Fitzhugh, that it would have been well addressed to the jury, if the prisoners had been upon their trial. It had, however, produced no altera-

tion in his opinion, as he still thought there was probable cause appearing to the Court to authorize the commitment of the prisoners for trial.

To determine this question, he said let us take a short view of the evidence. The depositions of General Wilkinson prove, unquestionably, the connection of the prisoners with Colonel Burr, in carrying into effect one common intent or plan, and their knowledge of this view. They indeed show, from the acts of the prisoners and their own confessions, their immediate agency in the furtherance of this scheme. If, then, it can be shown that Mr. Burr has *probably* committed treason, their agency and connection with him, while possessing this knowledge of his treasonable views, create the same probability against *them*, as in the same treason all in this stage of the business must be considered principals.

What, then, was the intention, the *quo animo*, with which Mr. Burr's expedition was undertaken? This, by General Eaton's deposition, is proved to be the separation of the Western from the Atlantic States, and the establishment of a monarchy there, of which Mr. B. was to be the sovereign. It is probable he had another object also in view, the invasion of Mexico; but this does not appear to be distinct from his treasonable plan of dismembering the union. This treasonable intention is also stated in the confessions made to General Wilkinson, by one of the prisoners. In the pursuit, then, of this object, we find that Mr. B. had actually commenced the expedition, and that he expected to be at Natchez with an armed force at a certain period. It appears, too, from the confessions of the prisoners themselves, that Mr. B. was levying a large body of armed men; and, what may go far to prove their knowledge of, and agency in that business is, that the officer who was to command the first five hundred men, is stated by name. One of the prisoners, also, says that he had written to Colonel Burr for provisions. Should these circumstances, of themselves, not amount to overt acts of levying war, upon which question the judge said he should at that time say nothing, yet when taken in connection with the situation of the country, the state of alarm existing among the people, and the active preparations of defence against an expected attack, they furnished strong *primâ facie* evidence that they had been followed up by the commission of other acts on the part of Mr. Burr and the prisoners, that would amount to a levying of war within the strictest definition of the terms. Nor is there any thing in the testimony that can positively exclude the inference of an active coöperation on the part of the prisoners in the different measures that are probably imputable to Mr. Burr.

The judge then remarked, that an observation made by himself, on issuing the warrant, seemed not to have been correctly understood by the prisoner's counsel. He had not said, that in the present case, it was necessary to resort to public documents to aid the depositions in furnishing probable cause for the arrest; but he would now observe, as he had then done, that although the depositions did, to his mind, establish a probable cause, on which he could act, yet that this probability was strongly corroborated by the message of the President, and other public documents on the subject. That even admitting that the 6th article of the amendments to the Constitution, which provides against general warrants, may require an oath or affirmation, before any warrant can issue, yet he could not subscribe to the doctrine, that the circumstances showing the probable cause, must, in all cases, be contained in the oath or affirmation itself.

If this principle be once considered correct, it would, indeed, when taken in connection with the necessity contended for in the present case, of proving, on a question of commitment, the positive existence of the offence charged, be the worst precedent, as it regarded the public safety, that could possibly be established, though at the same time it might be the most convenient cloak for treason that could be invented. Under this doctrine, even an authenticated record, showing the conviction of Mr. Burr of treason, could it be produced, on the present question would be deemed inadmissible in corroboration of the probable cause contained in the affidavits.

The judge concluded, by observing, that he was opposed to bailing the prisoners; for although the evidence might also have charged them with a misdemeanor, in setting on foot an expedition against a nation at amity with the United States, yet as they had been arrested on a charge of the highest offence against their country, nothing but their persons could be considered an adequate security to the public.

FITZHUGH, J., delivered the following opinion.

My extreme indisposition has prevented me from preparing any remarks in support of the opinion which I am called on to give; but since it has been thought proper, by the members of the court, to assign our reasons for the course which has been pursued, I shall express those sentiments which at present occur to me. This question has been argued, as if it were now before a jury who were called on to convict or acquit the prisoners, without recollecting that we are at that stage where, in the language of the Constitution, probable cause, supported by oath or affirmation, is sufficient. This remark is necessary to show that many of the conclusions of counsel are incorrect. In this incipient state the evidence is

always *ex parte*, and such as would be inadmissible at the final trial. A warrant goes forth to apprehend and afterwards to commit, on the suggestion of an individual, supported by oath, that a crime has been committed. The affidavit is made in the absence of the supposed offender, and no more certainty is required than probable cause. By a law of the United States, [1 Stat. at Large, 112] there must be the confession in open court, or the testimony of two witnesses to the same overt act, to convict one of treason. Whereas, probable cause, supported by oath or affirmation, will authorize issuing a warrant. In no case, whether criminal or civil, is an affidavit evidence at the trial, because taken in the absence of the party against whom it is intended to operate; and yet it has always been considered as sufficient to justify issuing a warrant to arrest. These inquiries obviously occur: 1st, Is there probable cause to believe, that any treason has been committed against the United States, and this supported by oath, &c.? 2d. Are the prisoners implicated in the treason? And 3d, How, whether as principals, or as only guilty of misprision of treason? That there is probable cause to believe that treason has been committed by Colonel Burr, the public rumor and universal alarm, which seems to have convulsed our country from the extremity to the centre, the President's communications to Congress and to the Court, afford at least ground of suspicion, and this is supported by the positive oaths of General Eaton, General Wilkinson, Mr. Donaldson, Mr. Meade, and Mr. Wilson, all going to show the origin, existence and progress of Burr's treasonable projects and acts. But here the counsel for the prisoners have insisted that none of this mass of evidence criminales Burr, and have contended that the President's communications are inadmissible. It is not generally by detached parts of evidence, but by a well-connected chain of circumstances, that we arrive at proof; nor can a crime be made out, by the proof of any solitary fact. In a charge of murder, it would not be sufficient to show, that a blow was given from which death ensued; but it is necessary to prove and disclose a particular state of mind. There must be deliberate resentment or ill-will; there must be *malice prepense*. So in treason, (the case now under consideration,) no degree of violence, however atrocious, no enlisting or marching men, no injury, if limited in its object to personal rivalry, or even extensive enough in point of locality to contemplate or threaten the opposition and destruction of the laws or government of any one of the United States, will amount to treason against the United States. It is the intention, alone, which fixes the grade of the offence. This intention is only to be collected from circumstances; and though the communications of the

President do not, of themselves, furnish full evidence of Burr's treason against the United States, yet they must be considered entitled to some weight in leading to the conclusion, that there is probable cause; but when, in addition to this, it is considered that the most solemn obligation is imposed by the Constitution on the President, to make communications of this nature to Congress, and that he has, also, in further discharge of his constitutional duties, ordered out the militia, which on ordinary and trivial occasions, he is not justifiable in doing, a person must be strangely incredulous who will not admit that there is probable cause of suspicion, that a dangerous insurrection or treason exists in our country. A report thus sanctioned by duty and oath, if made to this court, by one of its officers, would be respected, and why shall not a communication from the first executive officer of the union be credited, when he announces to the nation, information in the line of his duty? But this general ground of alarm is rendered more specific by the affidavits which have been exhibited to us. If the persons who have been sworn on this occasion are to be believed, (and no one has yet questioned their credibility,) they prove a scheme laid by Burr to usurp the government of the United States; to sever the Western States from the Union; to establish an empire west of the Alleghany Mountains, of which he, Burr, was to be the sovereign, and New Orleans the emporium, and to invade and revolutionize Mexico. That in prosecution of those projects, he wrote a letter to General Wilkinson, the commander-in-chief of the American army, with the avowed object and design of alienating him from his duty, and inviting him to embark in the undertaking, and holding out to him the most flattering and sanguine assurances and prospects of success. Horrid as this attempt was, yet if the information had reached no further, I should have no hesitation in saying, that it would have been nothing more than a conspiracy to commit treason, or some other offence. But when Burr assures Wilkinson that he had obtained funds, and actually commenced the enterprise; that detachments from various points, and under different pretences, would rendezvous on the Ohio the 1st of November, with the first five hundred or one thousand men in light boats, now constructing for that purpose; — when, in addition to this, Wilson and Meade swear that when they left New Orleans, the one the 15th, the other the 19th December, the strongest apprehension and belief universally prevailed among the inhabitants that Burr and his confederates had prepared an armed force, and were marching to attack and plunder the city; and that they knew that Wilkinson was decidedly of opinion, from the most satisfactory information, that Burr was advancing, and, under that belief, he

was putting the place in a posture of defence. When this coincidence of circumstances, and this strength of testimony appear, there can be little doubt of the existence and the extent of Burr's views, and of his having embodied and enlisted men, with views hostile to the government of his country, and that he had done acts which amount to levying war on the United States.

Burr's treason, then, being established, we are to inquire whether the prisoners were his confederates. They are represented, under oath, to have been bearers of the duplicates of Burr's letters, in cipher, to Wilkinson, and to possess Burr's confidence; they use arguments in addition to those in the letter, to invite Wilkinson to accede to their views; admit that they have corresponded with Burr on the subject, since their delivery of the letter; that Swartwout informed Wilkinson that Burr, with a powerful association, extending from New York to New Orleans, was levying an armed body of seven thousand men from New York, and the Western States and Territories, with a view to carry an expedition against the Mexican provinces, and that five hundred men, under Colonel Swartwout and Major Tyler, were to descend the Alleghany, for whose accommodation light boats had been built and were ready; said that New Orleans would be revolutionized, when the people were ready to join them, and that there would be some *seizing*.

Here, then, is evidence of a connection with Colonel Burr of a treasonable nature. What is it? The Act of Congress defines misprision of treason to be, a neglect to disclose the knowledge of a treason. But the prisoners have not only known of the treason, but carried a treasonable letter, knowing its contents; endeavored to further Burr's views and wishes, and to seduce Wilkinson from his duty. The offence exceeds misprision of treason, and as there is no intermediate class of offences of a treasonable nature between misprision and treason, it must be treason.

It has been observed, by the counsel for the prisoners, that no judge could commit on an affidavit made before any other judge. This distinction is certainly new, and I believe unprecedented. In all general warrants for arresting a supposed offender, the direction to the officer is, to bring the party before the person issuing the warrant, or some other justice of peace, &c., which would be, at least, nugatory, if no person could inspect or regard the affidavit, except the person before whom it was made. Therefore, I conclude, that Wilkinson's affidavits, made before justices of the peace of New Orleans, whose commissions appear to be properly authenticated by the Secretary of State, are evidence at this stage of our inquiry.

Legionary Paymaster v. Spalding.

I am, therefore, of opinion, that the prisoners should be committed for treason against the United States, in levying war against them.¹

THE LEGIONARY PAYMASTER v. ENOCH SPALDING, Collector of Militia Fines.

Judgment upon ten days' notice, cannot be rendered upon the bond given by the collector of militia fines.

MOTION on ten days notice, to recover the amount of militia fines, under the 22d section of the Act of March 3d, 1803.

The notice was of a motion for judgment against him and his sureties, on his collector's bond.

Refused.

¹ The order for the commitment of the prisoners was in these words: "The prisoners, Erick Bollman, and Samuel Swartwout, were brought up to court, in custody of the marshal, arrested on a charge of treason against the United States, on the oaths of General James Wilkinson, General William Eaton, James L. Donaldson, Lieutenant William Wilson, and Ensign W. C. Meade, and the Court went into further examination of the charge. Whereupon it is ordered, that the said Erick Bollman and Samuel Swartwout be committed to the prison of this court, to take their trial for treason against the United States, by levying war against them, to be there kept in safe custody, until they shall be discharged in due course of law."

The bench-warrant for arresting the prisoners, was in these words:

District of Columbia, to wit:

The United States of America, to the Marshal of the District of Columbia, greeting:—

[L. s.] Whereas there is probable cause, supported by the oath of James Wilkinson, William Eaton, James Lowrie Donaldson, William C. Meade, and William Wilson, to believe that Erick Bollman, commonly called Doctor Erick Bollman, late of the city of Philadelphia, in the State of Pennsylvania, gentleman, and Samuel Swartwout, late of the city of New York, in the State of New York, gentleman, are guilty of the crime of treason against the United States of America:—

These are, therefore, in the name of the said United States, to command you that you take the bodies of the said Erick Bollman and Samuel Swartwout, if they shall be found in the county of Washington, in your said District, and them safely keep, so that you shall have their bodies before the Circuit Court of the District of Columbia, for the county of Washington, now sitting at the capitol, in the City of Washington, immediately to answer unto the United States of America, of and concerning the charge aforesaid. Hereof, fail not at your peril, and have you then and there this writ. Witness the Honorable William Cranch, Esq., Chief Judge of the said Court, this 27th day of January, 1807.

WILLIAM BRENT, Clerk.

Issued 27th day of January, 1807.

Upon *habeas corpus* issued by the Supreme Court of the United States, at February term, 1807, the prisoners were discharged. 4 Cranch, 75.

RUTHERFORD v. MOORE.

Actionable words spoken in the second person, will not support an averment of words spoken in the third person.

The words "He gets his living by thieving," are actionable.

SLANDER. *Mr. F. S. Key*, moved for a new trial because the Court had admitted improper evidence; and in arrest of judgment because the words are not actionable. The words were, "He gets his living by thieving." It must be a specific charge of some crime or misdemeanor liable to punishment. A thief-catcher, an officer of justice, or a judge who gets fees, may be said to get his living by thieving; and he cited *Onslow v. Horne*, 3 Wilson, 186; *Hott v. Scholefield*, 6 T. R. 691; *Dawes v. Bolton*, Cro. Eliz. 888; *Baker v. Pierce*, Ld. Raym. 959, and *The King v. Aylett*, 1 T. R. 70.

Mr. Law, contra. The doctrine of *mitiori sensu* is obsolete; the modern rule is that words shall be taken according to their common understanding and meaning. *Beavor v. Hides*, 2 Wils. 300.

The errors in arrest of judgment, were overruled. The motion for new trial was on the ground that the Court erred in suffering words spoken in the second person, "you," &c. to be given in evidence in support of the allegation that the defendant said "He gets," &c.; and *Mr. Key* cited Esp. N. P. 521. *Mr. Law, contra*, cited *Rex v. Pocock*, Str. 1157.

The COURT granted a new trial on the ground of admitting the improper evidence.

Mr. Law, for the plaintiff, moved to amend; which was allowed on payment of the costs of this term, except the jury fee.

CIRCUIT COURT OF THE UNITED STATES.

MARCH, 1807, ADJOURNED COURT, AT WASHINGTON.

PROUT & KING v. GIBSON, Administrator of Abraham Young.

An injunction to a judgment at law for the purchase-money of land, on the ground of the difficulty of obtaining a title from the infant heirs of the vendor, cannot be supported if the purchaser neglected to pay the money in the lifetime of the vendor, and to demand a conveyance from him, and if the heirs are not made parties to the bill.

MOTION by *Mr. F. S. Key*, for the defendant, to dissolve an injunction which had been obtained to stay two judgments at law, for £1000 each, to be released on payment of £500 with interest at 3 per cent. from January 1, 1792, and costs, and it was agreed that all payments made to appear to James D. Barry, within two months, should be allowed. The bonds on which the judgments were rendered were given for the purchase of one hundred and eight and a half acres of land in the city of Washington, purchased by the plaintiffs of A. Young. The bill states that they have paid the whole purchase-money, excepting a sum not exceeding three hundred dollars, and always have been ready and willing to pay whatever upon settlement should appear to be due, upon receiving sufficient and legal conveyances of the property. That Young died intestate, leaving several infant children his heirs at law. That the plaintiffs have never received any valid and legal conveyance of the land; and that the infancy of the children renders them unable to convey. The answer of Gibson, admits the contract for the sale of the land by Young, and that two of the four bonds have been paid and delivered up. It states that the two last, upon which he has obtained judgments are yet unsatisfied, and that no part thereof has been paid, except what is credited on the back of the said bonds, and except the sum of £50, which he is informed was paid by Prout, in goods to the widow during her administration of Young's estate. That the complainants' allegation of payment of all except three hundred dollars is false. That complainants did not attempt to avail themselves of any such

payments, or exhibit any testimony in support thereof, when the judgments were obtained, although they attempted to avail themselves of the plea of limitations. That he knows of no claims which they are entitled to set off against the bonds. That Young lived a year after the last bond became due, and was always ready and willing to convey upon payment of the whole purchase-money; but he was never required to convey, and though he repeatedly demanded the money due, they never pretended that the want of a deed was the reason for not paying. That Young died intestate and that a considerable estate, unembarrassed by debts, descended to his issue. That no difficulty can exist in the complainants' obtaining a deed by filing a bill against the heirs in this Court, which measure was long ago proposed to complainants, who agreed to prosecute the same, and seemed satisfied it would be effectual.

CRANCH, C. J., delivered the opinion of the Court.

Two grounds of equity are relied upon by the bill. 1st. That the complainants have paid the whole amount of the bonds except a sum not exceeding three hundred dollars. But it does not state how, nor when, the money was paid, nor why they did not avail themselves of those payments at law; nor why they did not prove those payments to J. D. Barry, who was by consent to have ascertained what payments had been made, and the plaintiff at law had bound himself on record to allow them if shown at any time within two months after the rendition of the judgment, and the plaintiff had agreed to stay execution for that purpose until that period had elapsed. The bill contains no attempt to account for that negligence; nor does it state any payments or offsets, of which the complainants might not have availed themselves at law. The allegation of payment therefore shows no ground of equity. 2d. The second ground of relief relied on by the bill, is, that the legal estate in the land purchased, has descended to infants who are incapable of making a valid conveyance. This is no reason why the money should not finally be paid to the administrator, but it might have been a reason for a temporary injunction, provided the complainants had at the same time made the heirs parties to the bill and had proceeded against them to obtain a conveyance. It is owing to the default of the complainants in not paying the money in the lifetime of Young, that they have not long ago received the title; and to give them further time, on account of the delay necessary to obtain a decree for a conveyance, would be to give the complainants an advantage by their own wrong; an advantage which they ought not to enjoy, especially as they have taken no measures to obtain a conveyance, in the only manner in which it can now be obtained.

It is objected that, on payment of the money, the complainants are entitled to a conveyance clear of expense; this would be true if they were in no default. But if they were to file their bill now against the infants and obtain a conveyance by that means, the Court would not oblige the infants to pay the costs, because neither they nor their father have been in any default. The complainants ought to have made the heirs parties to the bill, because the administrator had no power to convey, and perhaps had no means of compelling the heirs to convey. It is setting up against the administrator an objection applicable only to the heirs, and which they alone by the aid of the Court, can remove; and unless they are made parties, the same objection must continue at least, until all the heirs come of age; and may be perpetual, unless the heirs should choose, after they come of age, to make the conveyance. The bill does not state that a conveyance was ever demanded of Young, in his lifetime, nor that he ever refused to convey. The answer shows that the whole purchase-money became due a year before the death of Mr. Young, and that he pressed the complainants for payment, which they neglected, and it denies that a conveyance was ever demanded of him. The obstacles which his death have thrown in the way are the consequence of the neglect and default of the complainants, and it was incumbent upon them to seek to remove them. As neither the administrator nor his heirs have been guilty of default, and as the complainants have not requested the aid of this Court to obtain a title, there is no equitable ground for continuing the injunction.

Injunction dissolved.

CIRCUIT COURT OF THE UNITED STATES.

APRIL, 1807, ADJOURNED COURT, AT ALEXANDRIA.

Ex Parte NEGRO AMY.

If the owner of a slave who sues for freedom will not give the security required by law, he must pay the prison-fees for the commitment and safe custody of the slave pending the suit in the county of Alexandria.

NEGRO AMY, on her petition for freedom, having at November term, 1805, been delivered to the custody of the marshal by order of the Court, and none of the material facts stated in the petition being proved by affidavit or otherwise, to the satisfaction of the Court, it is ordered that she be delivered to Joseph Thomas, who is stated, in her petition, to have held her in slavery, upon his paying the marshal's fees for her custody, while in actual confinement under the said order.

DEAN *v.* ELI LEGG *et al.*

In a chancery attachment, if the subpoena be served on the principal, the bill cannot be taken for confessed for non-appearance, as in ordinary cases in equity; but there must be an affidavit and publication, &c., according to the Act of Virginia, p. 115.

Mr. Taylor (as *amicus curiæ*) suggested that the Court could not take the bill for confessed, nor proceed to decree against Legg. The subpoena was served on Legg, and the bill, having been filed three months, was taken for confessed. The debt was due from Legg to the plaintiff on promissory notes under seal. The bill states, in the usual form, that the defendant Legg is a non-resident of the District of Columbia, and cannot be found so as to be served with process. At the expiration of three months after the filing of the bill and service of the subpoena, the bill was taken for confessed at the rules. There was no affidavit of non-residence and no order of publication.

There was an agreement between the plaintiff's counsel and James Legg, by which the attached effects were released, and possession of the wagon and horses given to him, upon his entering into an agreement to be answerable for the decree.

Wallace v. Taylor.

If it is taken as confessed that defendant was a non-resident, then there must be publication, &c., according to the Act of Assembly.

Mr. Simms contended that the subpœna served is as good as an order of publication.

CRANCH, C. J., delivered the judgment of the Court.

This is a chancery attachment against Eli Legg as principal debtor, and the other defendants as garnishees. The case, as between the plaintiff and Eli Legg, is a case at law, the debt being due upon single bills under seal. The jurisdiction of this Court as a court of equity is given merely by the Act of Assembly, (p. 115) giving a remedy in equity against absent debtors having effects in the hands of persons within its jurisdiction, and the Act of Congress of the 3d of May, 1802. [2 Stat. at Large, 193.] That Act of Assembly points out the mode of proceeding in order to obtain a decree in case the principal debtor should not appear and give security. That mode of proceeding has not been adopted, but inasmuch as the subpœna was served on Eli Legg, who has not appeared and given security, the plaintiff proceeded to take the bill for confessed, as in ordinary cases in chancery after the expiration of three months from the filing of the bill and the service of the subpœna.

The Court is of opinion that the bill has been erroneously taken for confessed; because the only ground of jurisdiction of the Court, and the only title to relief which the plaintiff can claim, are under the Act of Assembly, which describes particularly the mode of proceeding in such cases. That mode of proceeding not having been pursued, the Court is not authorized to make a decree. A publication, according to the provisions of the act, is necessary.

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WALLACE v. F. S. TAYLOR AND THE MARINE INSURANCE COMPANY OF ALEXANDRIA.

A material amendment of a bill, after answer, must be on payment of all costs, including the solicitor's fee.

CHANCERY ATTACHMENT. Motion to amend the bill, after answer of Marine Insurance Company denying funds in their hands.

Mr. Taylor, for the plaintiff. The amendment is to state specially a loss of F. S. Taylor's vessel or goods, so as to get a specific answer as to the particular circumstances of the insurance and loss. The amendment was granted on payment of all costs, including solicitor's fee, and the cause sent to the rules. The same order in *Wilson v. same*, and *Hartshorne & Taylor v. same*.

Ex Parte E. J. LEE, Executor of Craik.

The Orphans' Court of Alexandria county cannot, in any case, grant letters testamentary without security, unless the testator's visible personal estate is sufficient to pay all the debts.

PER CURIAM. Mr. Lee was appointed one of the Executors of W. Craik, deceased, who by his will declares, that "it is his wish and desire that his executors, or either of them, should not be required to give security as executors of his will."

Mr. Lee applied to the Orphans' Court of Alexandria county for letters testamentary, which were refused, because it did not appear, to the satisfaction of that court, that there was visible estate enough to pay the testator's debts, and the court having reason to doubt, from its own knowledge, whether the testator's personal estate was sufficient for that purpose. From the judgment of that court Mr. Lee has appealed to this.

The right to letters testamentary without giving security is claimed under the will and the Act of Assembly (p. 163) which allows it only in cases where the testator shall have visible estate more than sufficient to pay all his debts, nor even in that case if the court shall see cause, from its own knowledge, to suspect that the testator's personal estate will not be sufficient to discharge all the debts.

A second application was made to the court grounded on a statement of debts due from the testator in the county of Alexandria, and a schedule of personal estate in that county, without any estimate of the value thereof. But the Court again refused, and from that judgment there is also an appeal to this Court.

This COURT can see no error in either of those decisions, and is of opinion, that that court was bound by law to decide as it has decided.

The appeal must therefore be dismissed.

WILSON'S ADMINISTRATORS v. BASTABLE.

A general allegation of difficulty in procuring vouchers, or of unavoidable delay in settling an administration account without stating from what circumstances that difficulty and delay arose, is not sufficient ground of equity to enjoin a judgment at law.

CRANCH, C. J., delivered the judgment of the court. The bill states that the defendant commenced a suit at law against the plaintiffs as administrators of Cumberland Wilson, deceased, upon a promissory note for £100, to which action the plaintiffs pleaded

plene administraverunt, "but from the difficulty and unavoidable delay they met with in getting vouchers for those to whom they had paid money for the estate, and getting the estate account settled, they were not able to produce evidence at the trial of the said suit, that they had fully administered, by reason whereof a verdict and judgment were had against them for the debt aforesaid and 40 dollars damages and 13 dollars 33 cents costs." That since the judgment they have settled their administration account with the Dumfries District Court, "by which it will appear that they had fully administered the assets which had come to their hands, and that the estate was indebted to them on the 24th of October, 1801, \$17,566." That since the said settlement they have received 896 dollars, which reduces the balance to 16,570 dollars. That at the time the judgment was obtained in October, 1800, there was due to them for money paid by them for the estate more than 17,566 dollars. That they have paid the 40 dollars damages and the \$13.33 costs, "and that the defendant owes the said Cumberland \$60." That the defendant brought suit in this Court on the judgment and obtained judgment thereon, without allowing credit for the 40 dollars damages and \$13.33 costs, and will proceed to issue execution thereon, unless prevented by a court of equity; — they therefore pray an injunction, and general relief.

An injunction was granted by one of the judges of this Court. The answer of the defendant states that his action was founded on an accepted bill of exchange of Cumberland Wilson. That the trial at law was fair, and contends that the plaintiffs are not entitled to relief in equity; it neither admits nor denies the settlement of the administration account, nor the plaintiff's allegation of difficulty and unavoidable delay in obtaining vouchers and settling their accounts. But it insists that the defendant's claim was among the first to be preferred in marshalling the assets. It neither admits nor denies the payment of 40 dollars damages and costs; but says he is ignorant on that subject, and is willing to admit it, if paid. At March term, 1805, this Court ordered the master to state the administration account of the plaintiffs, noting the times of the respective payments, and certifying the vouchers; upon report it appeared that the sums alleged by them to have been paid by them, in the administration of the estate, were principally sums due to themselves, a large part whereof, and more than sufficient to absorb all the assets, was for bills of exchange, upon which Mr. W. Wilson was indorsed, and which he had taken up more than three years before the death of his testator, and more than five years before the trial of the cause in the Dumfries District Court. A strong presumption arises from this cir-

cumstance that the vouchers were in his own hands — and if any difficulty did arise in obtaining them in time to produce them at the trial at law, it must have arisen from his own negligence. It at least throws the burden of proof on him to show special circumstances of accident, before any equity can arise in his favor.

If he had a right to retain all the assets for the satisfaction of his own debt, he might have availed himself of it at law. The bill does not state any one specific fact of accident which prevented him from doing so, and such an accident cannot be presumed, especially in such a case. Excepting the allegation of the payment of the 40 dollars damages and the costs, which were not credited in the second judgment, I see no ground of equity in the bill. A general allegation of difficulty in procuring vouchers, or of unavoidable delay in settling accounts, without stating from what circumstances that difficulty and delay arose, is too vague and indefinite even to support an injunction in the first instance.

The Court, at March session, 1806, dissolved the injunction, except as to the \$40 damages and \$13.33 costs, which were admitted by the defendant's counsel to have been paid. Since that time, no evidence has been produced, and the cause having now come to a final hearing, the Court can only dismiss the bill with costs.

The allegation, that the defendant was indebted to the intestate in the sum of \$60, is an amendment to the bill, I believe made since the dissolution. It is, however, a naked allegation, without circumstances and without proof. In the account taken by the master, it appears that the plaintiffs have paid a judgment for more than \$2000, rendered since that recovered by the defendant. This, probably, would at law be deemed an admission of assets. But at all events, as the bill is totally deficient in equity, except as to the amount paid for the damages and costs, and as no proof, whatever, had been adduced in support of any circumstance of accident, the injunction must be perpetual as to the \$40 damages and the \$13.33 costs, and the bill must be dismissed with costs as to the residue.

Mr. E. J. Lee, for the plaintiffs, cited 1 Har. Ch. Pr. 33; 1 Fonb. 13, 34, 340; *Silk v. Prime*, 1 Bro. C. C. 138, in the note; *Perkins v. Baynton*, Ib. 375; Virg. Law, p. 165, § 33, and Act of Virg. 1806, respecting mispleading by executors and administrators; also, *Waring v. Danvers*, 1 P. Wms. 295; *Cockroft v. Black*, 2 P. Wms. 298; *Croft v. Pyke*, 3 P. Wms. 183; *Jacomb v. Harwood*, 2 Ves. 268; and *Robinson v. Cumming*, 2 Atk. 411.

Mr. Swann, for the defendant.

WALKER et al. v. WANTON et al.

If a debtor, in embarrassed circumstances, agrees to deliver to some of his creditors sufficient goods, at certain prices, to discharge their claims, and a part are selected, and inventoried, and removed from the shelves and set apart, and other creditors come in, and, with consent of the debtor, take possession of the whole, and of the inventory, and prevent the other creditors from finishing their selection, these creditors may, by a bill in equity for discovery, oblige the others to give up the inventory, to enable the former to support their action at law for the goods selected.

THE bill states that the defendant, Wanton, being indebted to the plaintiffs, agreed to assign to the plaintiff, Walker, in trust for himself and the other plaintiffs, so much of his merchandise, as the plaintiff, Walker, should judge sufficient to satisfy the several claims of the plaintiffs. That it was understood, at the time, that the goods were to be charged to the plaintiffs at the invoice price, with costs and charges thereon. That in pursuance of that agreement, the plaintiff, Walker, went to the store of Wanton, with the assistance of whose clerk, he proceeded to select and inventory the merchandise, for the purpose of satisfying the said agreement. That he was several days engaged in the selection, in the course of which he took down from the shelves a considerable portion of merchandise, which was set apart as the property of the plaintiff under the agreement, and was inventoried and charged as such by the clerk of Wanton. That some of the goods thus selected and inventoried, were carried to the warehouse of Rickets & Newton, and the residue into the back warehouse of Wanton, and the whole goods selected were thus removed, for the benefit of the plaintiffs, from the places where they were kept for sale. That, at the time of the agreement, Wanton was somewhat embarrassed in his affairs. That when it was known, by the defendants, Janney and others, creditors of Wanton, that the plaintiff was engaged in selecting the merchandise in pursuance of the said agreement, they complained to Wanton of the injustice of the preference given to the plaintiffs, although they knew that the goods which the plaintiffs were receiving, were the very goods which they had before sold to Wanton, and urged him to withhold from the plaintiffs the goods which had been deposited in the back warehouse for their use, as well as the residue which the complainants were entitled to under the agreement; and that the defendants, Janney and others, interposed before the selection was completed, and when the plaintiff, Walker, was proceeding to finish the selection, he was opposed by Wanton, who alleged the interference of the other creditors, and abandoned his store and back warehouse to the defendants,

Janney and others, who refused to suffer the plaintiff, Walker, to proceed to finish his selection, or to take away the goods already selected. That the goods set apart and inventoried for the plaintiffs, were all priced and charged in the inventory, but the prices not extended, and the aggregate amount of the goods selected was not extended. That when the defendants took possession of the store, warehouse, and goods, they got possession of the books and papers of Wanton, and of the inventory of the goods selected, but the plaintiffs expected the defendants would have furnished the plaintiffs with a copy of it, in order that the plaintiffs might be able to describe their said goods, and support their title at law to the same, which, although demanded, they have refused, and have kept it among themselves, and appropriated to their own use, the goods selected by the plaintiffs, and refuse to pay the debts due by Wanton to the plaintiffs.

The plaintiffs complain that they are remediless at law, and cannot obtain from the defendants a discovery of the inventory, and of sundry other matters and things necessary to the establishment of their claim to the residue of the merchandise left in the store of Wanton, without the interposition of this Court as a court of equity. The bill then calls upon all the defendants for a discovery and production of the inventory.

The defendants have answered, but none of them have produced the inventory, nor discovered minutely the contents, although it is admitted to be in the hands of the defendant, Green, who offers to produce it, if he shall be so ordered by the Court. To the answer of Green, there is an exception taken on that ground, which has now come on to be heard. Before the Court can decide the answer insufficient in that respect, they must be satisfied that the plaintiffs have a right in equity to require that defendant to produce it.

Mr. Swann, for the plaintiffs, cited 2 Bl. Com. 447, 448.

Mr. C. Lee, for the defendants, cited *Finch v. Finch*, 2 Ves. 394; 2 Powell on Contracts, 221; *Like v. Berresford*, 3 Bro. C. C. 366; *Wrottesly v. Bendish*, 3 P. Wms. 237; *Hall v. Adkinson*, 2 Vern. 463; 1 Wooddeson, 205; *Fowler's Exch. Prac.* 55; *Mitford*, 157, 162.

CRANCH, C. J., thought the plaintiffs not entitled to the discovery against the other creditors, because the equity of the defendants is equal to that of the plaintiffs, who ought to be left to law to enforce their preference, if they have any.

FITZHUGH, J., and DUCKETT, J., *contrà*. Being of opinion that the plaintiffs had acquired a legal title to the goods, and were therefore entitled to a discovery of the evidence.

The answer of Green was adjudged insufficient, and he was ordered to produce the inventory.

RAMSAY v. RIDDLE & THORNTON.

The Court will not enjoin what, may or may not be nuisance.

MOTION to dissolve an injunction to restrain the converting a wooden warehouse into a bakehouse.

Mr. F. L. Lee, and *Mr. C. Lee*, for the plaintiffs, in support of the injunction, cited 1 Fonb. 29; Amb. 159; 2 Ves. 452; Amb. 209; 2 Bro. C. C. 64; Mitford, 103, 107; 3 Inst. 201; 3 Bl. Com. 216; Ld. Raym. 486; Wood's Inst. 538; Cro. Car. 366; 2 Shower, 327; Strange, 1167; 12 Mod. 342; 16 Vin. 23.

Mr. E. J. Lee, and *Mr. Swann*, *contra*, cited 4 Bl. Com. 168; 1 Hawk. c. 75, § 12; 3 Bl. Com. 219; Id. 5; 1 Hawk. c. 75; 3 Atk. 21; 12 Mod. 510; 3 Atk. 750; 1 Fonb. 21, 29, 30; 4 Bro. C. C. 165; 2 Ves. Jr. 42; 16 Vin. 23; 2 Har. Ch. 237.

Mr. Jones, for the plaintiffs, cited Fran. Max. 30; 1 Burr. 334; 6 Mod. 145; Bac. Ab. tit. Nuisance.

The injunction was dissolved without costs, (*nem. con.*)

The COURT said, if the house in fitting up, should not be well secured against danger from fire, it might be the ground of an injunction to prevent the use of it as a bakehouse.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1807, AT WASHINGTON.

MECKLIN v. CALDWELL.

In assault and battery, the affidavit to hold to bail, must state some specific injury to the person of the plaintiff, and must be positive as to some amount of damages.

ASSAULT AND BATTERY. The affidavit stated a beating, without any special damage, except that the plaintiff could not, for some days, transact all his business, as clerk in one of the departments, as well as usual, and that the injury was such, that he thinks that ten pounds sterling would not be too great a compensation therefor.

The COURT refused to hold defendant to bail on the affidavit, it not being positive as to any amount of damages, and not stating any specific injury to the person of the plaintiff.

FITZHUGH, J., absent.

GREENLEAF v. CROSS.

Affidavit to hold to bail.

AFFIDAVIT that defendant was justly indebted to the plaintiff for one thousand weight of crop tobacco, for rent.

The COURT thought it sufficient to hold to bail.

FITZHUGH, J., absent.

ALDRIDGE v. DRUMMOND.

Bail.

THE plaintiff's counsel was absent, but a bond for money was filed as the cause of action.

Mead v. Scott.

Mr. Law, for the defendant, offered to appear without bail.

The COURT said, that he could not appear without bail, until he should be committed for want of bail, when he might appear and plead in custody.

FITZHUGH, J., absent.

WOOD v. DIXON.

The Court will not order the defendant's appearance to be struck out, so as to charge the marshal.

THE plaintiff had ordered the writ in proper person, and his appearance was so entered on the docket. On calling over the appearance docket, —

Mr. Law, for the defendant, had entered an appearance for the defendant, without bail, although a note had been filed as to the cause of action.

Mr. F. S. Key now moved to appear for the plaintiff, and to have defendant's appearance struck out, and defendant ruled to bail, or the marshal amerced.

But the COURT refused — because the marshal, by the appearance, was discharged from the duty of keeping the defendant in custody, and it is to be presumed has discharged him, and cannot retake him.

MEAD v. SCOTT, Appellee.

Costs on appeal from a judgment of a justice of the peace, are within the discretion of the Court, if the judgment be affirmed in part.

UPON an appeal from the judgment of a justice of the peace, the jury found a verdict for the appellee, for \$10.69. The judgment of the justice was for \$17.50.

Mr. Law, for the appellant, contended for costs. Appeals from justices of the peace are given by the Maryland Act of 1791, ch. 68. The condition of the appeal-bond only provides for costs in case the judgment shall be affirmed.

The appellee cannot sue upon the bond, for the condition has not been broken. The judgment has not been affirmed, although the appellee has recovered something; yet he had obtained a judgment below for too much.

In the case of *Austin v. Hughes*, in Montgomery County Court, the judgment was diminished only two dollars, and yet the appellant recovered judgment for costs.

Veatch v. Harbaugh.

Mr. F. S. Key, contra. It is an appeal as to fact as well as law, and new evidence was admitted. The case is taken up *de novo*. Costs are a matter of discretion. The bond, if appellant had given one, would have bound him to pay all such damages and costs as this Court shall award against him.

Mr. Morsell, in reply, admits that this Court has original jurisdiction as to fact, but as to law it is only appellate. If the proceedings below are not regular, the judgment must be reversed. If this Court, or the jury, should give more than the justice of the peace had given, appellee may release and affirm the judgment as to the residue. If the judgment below was erroneous, the appellant has sustained his appeal, and ought not to pay costs.

The COURT was of opinion that in such cases costs are within the discretion of the Court, and as there was no evidence of a tender of any part of the money, or any offer to pay as much as the appellee finally recovered; it is the opinion of the Court that the judgment of the justice ought to be affirmed as to the sum awarded by the jury, with costs, and reversed as to the residue.

UNITED STATES v. EDWARD WALKER.

Stealing wood, in collusion with the owner's slave, is larceny.

INDICTMENT for stealing wood. The evidence was that the wood was delivered to the prisoner (or rather suffered to be taken) by the owner's servant, a slave.

The COURT (DUCKETT, J., absent,) directed the jury that if they should be satisfied that there was a collusion between the servant and the prisoner, with intent to commit a theft, the fact of the delivery does not alter the case, but it is still a felony.

VEATCH v. HARBAUGH.

The plaintiff will not be permitted to file his replication, after the rule-day, and in term time, but upon condition of a continuance of the cause to the next term.

THIS suit was brought to July term, 1803. A rule was laid on the plaintiff to reply by the last rule-day. A replication was filed without consent, on the second day of this Court and not on the rule-day.

Wigfield v. Dyer.

The COURT refused to receive the replication but upon the terms of a continuance to the opposite party.

Mr. Vanhorn, for the plaintiff.

Mr. Morsell, for the defendant.

JAMES DUNLOP AND WIFE v. THOMAS PETER *et al.*

The party, upon whom the burden of proof is thrown by the issue is to open and close the argument.

ISSUE from the Orphans' Court to ascertain the sanity of a testator. It was made a question who was to open and close the argument.

Mr. Mason and *Mr. F. S. Key*, for the defendants. The plea is that the testator was of sound mind, and of this they put themselves on the country; the affirmative of the issue is with the defendants.

Mr. P. B. Key and *Mr. Jones*, *contrà*. He who has the burden of proof is to open and close. Every man is presumed to be sane, until the contrary is proved. The plaintiffs were the original libellants, and the general rule is that the plaintiff is to open and close unless special circumstances make the other rule necessary. The affirmative of the issue is with us, not the mere form of words, but the substance; we have the burden of proof.

PER CURIAM. The substance of the affirmative of the issue is with the plaintiffs, the original libellants. They are the party who wish to alter the existing state of things. The defendants can offer no evidence until the sanity of the testator is impeached. The defendants have nothing to do. The plaintiff is the mover, the actor, and on him the burden of proof lies. It is his business therefore to open and close the argument.

DUCKETT, J., absent.

WIGFIELD v. DYER.

When leave is given to amend on payment of costs, the payment is not a condition precedent, unless so specially expressed in the order.

THERE had been a plea in abatement, upon which the plaintiff had leave to amend on payment of costs. The amendment was immediately made at the last term, no costs being paid; and a rule laid on the defendant to plead, which rule had not been complied with.

Mr. Morsell, for the plaintiff, moved for judgment on the rule to plead.

Mr. F. S. Key, for the defendant, objected that the plaintiff had not paid the costs and therefore ought not to have the benefit of the amendment and his rule. And the Court at first inclined to that opinion, considering the payment of the costs as a condition precedent. But on reflection and inquiring of the bar as to the practice, and on examining the Court's notes of cases, and finding no case in which the question had been before made, —

The COURT said that they understood the general practice to be not to insist on the payment of costs in such cases as a condition precedent. However, there might be cases in which the Court, in their discretion, would direct the costs to be first paid.

RUTHERFORD v. MOORE.

Quære, whether a witness, who has declared his disbelief of a future state of rewards and punishments, is a competent witness. And whether such declarations can be given in evidence to the Court, to prevent the witness from being sworn and examined.

SLANDER. The plaintiff offered J. A. as a witness.

Mr. F. S. Key, for the defendant, objected that the witness had declared his disbelief in a future state of rewards and punishments, and stated that he had witnesses ready to prove such declarations.

CRANCH, C. J., stopped him, and doubted whether that mode of proceeding had ever been adopted in any Court; and whether the fact, if proved, did not go rather to the credit than the competency of the witness.

The COURT asked *Mr. Key* for authorities. He cited *Esp. N. P.*; and *Peake's L. E.* 90; *Omichund v. Barker*, 1 Atk. 21, K.; 1 Wils. 84; Willes, 538.

The COURT inclined to think that the only mode of proving the fact of belief has heretofore been by an examination of the witness himself, and that it ought to go rather to the credit. But *Mr. Key* waived the question as to the competency, and examined his witnesses as to the credibility.

BEALL v. NEWTON.

In covenant upon an issue on the plea of general performance, the plaintiff is not bound to produce the original covenant.

The party who holds the affirmative of the issue has the right to open and close the argument to the jury.

THIS was an action upon a covenant in a mortgage for pay-

ment of money ; plea general performance, general replication and issue.

Mr. F. S. Key, for the defendant, contended that the original covenant ought to be produced.

The COURT (FITZHUGH, J., absent) said he could not demand the production of the original. He had admitted the execution of the deed and its contents. He had either had oyer or he had not. If he pleaded without oyer, he equally admitted the statement of it in the declaration to be true, if he had oyer he has spread it on the record.

Mr. Key, then contended, that there being a power of sale in the mortgage, the jury had a right to presume and ought to presume, that the land existed, that the title was good, that Beall had sold it, and received full satisfaction of the debt.

But the COURT said that there was no such presumption, and that it was incumbent upon *Mr. Newton* to prove that Beall had sold the land, and that it had produced the money.

The defendant's witness had stated that he had heard that the land sold for one hundred and ten dollars. The plaintiff's counsel, *Mr. Morsell*, did not object to such testimony ; and in arguing to the jury, stated it to be evidence. *Mr. Key* contended that it was not evidence ; and so the Court decided.

Mr. Key claimed a right to open the argument to the jury.

DUCKETT, J., said that in his practice the plaintiff uniformly opened and closed.

CRANCH, C. J., said that the practice of this Court always had been that the party who held the affirmative, and on whom the burden of proof lay, had the right to open and close the argument to the jury ; but if there were more issues than one, and the plaintiff held the affirmative in any one of the issues, the plaintiff had the right. 3 Bl. Com. 366.

DUCKETT, J., acquiesced in consequence of CRANCH, C. J., stating the practice to be so.

NEGRO FIDELIO v. ALICE DERMOTT.

The sale of a slave upon the express condition that he should be free at the end of six years, is not a manumission under the Maryland Act of 1796, c. 67. A manumission by will is not in prejudice of creditors if the real and personal estate are sufficient without the value of the manumitted slave, to pay all the debts of the testator.

A manumission by will after a term of years is not revoked by a codicil, directing all the negroes to be sold, if at the time of making the codicil their term of service had not expired.

PETITION FOR FREEDOM. The petitioner proved by Lund Washington that he was sold by him to James R. Dermott, in April,

1800, upon the express condition that he should be free at the expiration of the term of six years from the sale; and the price paid (£80) was much less than if the sale had been for life.

Mr. F. S. Key, prayed the Court to instruct the jury that such evidence is not evidence of a manumission, and is not of itself, without a writing, sufficient to establish the freedom of the petitioner. See Laws of Maryland, 1796, c. 67, § 29.

Mr. Caldwell, for the petitioner, contended that the Act of Assembly was not negative of any other mode of manumission. The words are, "may manumit." The law was intended to prevent old and infirm negroes becoming a burden to the public.

The COURT (FITZHUGH, J., absent,) gave the direction as prayed.

CRANCH, C. J., wishing the question of law might be reargued on a motion for a new trial in case the verdict should be against the petitioner, —

The petitioner's counsel then gave in evidence the will of James R. Dermott, by which he bequeathed the petitioner his freedom after a service of four years.

To repel this, *Mr. Key*, for the defendant, produced the inventory and settlement of the personal estate in the Orphans' Court, by which it appeared that the defendant had paid eight or nine hundred dollars more than the inventory and debts collected, to show that the manumission by will was in prejudice of creditors.

Mr. Caldwell and *Mr. Law*, for the petitioner, objected, that it was only evidence as to part of the estate, namely, the personal.

The COURT admitted the inventory and settlement to be given in evidence, but said it was not conclusive; it only threw the burden on the other side, to show that there was estate enough, besides the value of the petitioner, to pay all the debts.

The COURT also, after argument, instructed the jury, that if they should be satisfied, by the evidence, that the real and personal estate of the intestate, exclusive of the value of the petitioner, was more than sufficient to pay his debts, the bequest of his freedom was good. (See Act of Assembly, 1796, c. 67, § 13.)

Mr. Key, for the defendant, then contended that a codicil, by which the testator ordered his "negroes," (generally,) to be sold, revoked the bequest of freedom.

But the COURT said clearly it does not, because, at the time of making the codicil, there were three years unexpired of the time of his service; which might be sold, and so make the codicil consistent with the will, and give operation to both.

Verdict for the petitioner.

NEGRO BEN v. SABRETT SCOTT.

The general issue on a petition for freedom is that which puts in issue the simple question, whether free or not.

Under the Maryland law of April, 1783, c. 23, the slave imported does not gain his freedom by the omission of the master to prove, to the satisfaction of the naval officer or collector of taxes, that the slave had resided in one of the United States three years before importation.

PETITION FOR FREEDOM. The cause being called for trial, and no issue made up, *Mr. Jones* and *Mr. Morsell*, for the defendant, asked for time to put in a plea denying the facts in the petition, which were stated as the ground of the right to freedom. The petition contained also a general allegation that the defendant unjustly held the petitioner in slavery.

The COURT said that they would receive the general issue only, unless the petitioner should agree to continue the cause.

The defendant's counsel contended that a denial of the special facts was a general issue.

But the COURT (*FITZHUGH*, J., absent,) said the general issue was that which put in issue the simple question whether free or not.

Mr. Key, for the petitioner, moved the Court to instruct the jury, that they must be satisfied that the defendant made it appear to the satisfaction of the naval officer or collector of taxes, that the slave was a resident of one of the United States, agreeably to the Maryland Act of April, 1783, c. 23, which prohibits the importation of slaves generally, but excepts those who should have resided three years in some of the United States; and provides that such residence shall be fully proved to the satisfaction of the naval officer, &c.

Mr. Jones, for the defendant. It is sufficient if he proves the fact now, before the Court. If the defendant had satisfied the collector or naval officer, he might have been still called upon to prove the fact before this Court. The act is merely directory; it is no part of the proviso.

Mr. Key, in reply. The legislature have expressly declared that the proof of the fact shall be made before a certain officer, and in a certain manner. They had probably reasons of policy which required it should be so done; and the manner of proof is equally essential with the substance.

The COURT (*FITZHUGH*, J., absent,) directed the jury as prayed, but said it was a question of some doubt, and they would hear the point reargued on a motion for a new trial, if the verdict should be against the defendant.

Mr. Jones, for the defendant, then offered a certificate, dated June 16, 1807, (four days ago, this being June 20, 1807,) signed

Hyde v. Liverse.

by John Barnes, the United States collector and naval officer at the port of Georgetown; that the defendant had on that day proved to his satisfaction that the petitioner had been a resident three years, &c.

Mr. Key, contended that the importation and oath must be concomitant with the coming in of the master. But if not, yet he ought to have done it during the existence of the law (the Act of 1783.) It is his own negligence if he did not. He had till 1796 to do it.

The COURT (DUCKETT, J., absent,) refused to admit the certificate in evidence.

The defendant then offered a like certificate signed by Richard Jamieson, collector of the tax for the county of Washington, dated June 12th, 1807, which was also rejected by the Court.

Verdict for the petitioner.

(Reversed in the Supreme Court. 6 Cranch, 3.)

ELIZA WILSON v. MICHAEL COLMAN AND OWENS LYONS.

To prove a partnership, parol evidence cannot be given of the contents of printed cards, bearing their joint names, nor are the cards themselves evidence unless traced to the defendant. Nor can general reputation of partnership be given in evidence.

INDEBITATUS ASSUMPSIT for board, lodging, and washing, of Coleman & Lyons, and Richardson their apprentice. The witness spoke of printed cards which he had seen bearing their joint names.

Mr. Jones, for the defendant, Lyons, objected to evidence respecting the cards, unless they were produced and traced up to the defendant.

The COURT (DUCKETT, J., absent,) said they must produce the cards; they could not give parol evidence of their contents.

Mr. John Hewitt, for the plaintiff, asked the witness whether the defendants were not generally reputed partners.

Mr. Jones objected, and the Court decided the question to be improper.

HYDE v. LIVERSE.

The Court will not grant a continuance for the defendant on the ground that his receipts are mislaid, unless the affidavit state the amount and date of the receipts, so that the plaintiff may admit or deny them; nor unless it state circumstances by which the Court can judge whether reasonable diligence has been used in searching for them.

Indebitatus assumpsit will lie for money due upon a special contract executed on the part of the plaintiff.

THE affidavit to continue the cause stated that the defendant had receipts for money paid to the plaintiff, which were necessary, material, and competent evidence for his defence; that he has used his reasonable endeavors to procure the same, but finds they have become mislaid; and though he has searched among his papers with diligence, without success, he believes by the next court he will be able to ascertain where they are and to produce them, and that they would considerably reduce the plaintiff's claim.

The COURT (DUCKETT, J., absent,) refused to grant a continuance, because the affidavit did not state the sums of money for which the receipts were given, nor the dates, so that the plaintiff could admit or deny the same; and because the affidavit did not state any circumstances by which the Court could judge whether the defendant had used reasonable diligence in searching for the receipts.

This was an action of *indebitatus assumpsit* for 207 dollars, for 88½ cords of wood sold, and delivered. There was another count upon *indebitatus assumpsit* "for sundry matters properly chargeable in account, as per account filed." The plaintiff's witness proved an agreement, by which the defendant was to cut and take away from certain land of the plaintiff's, all the wood growing thereon, either at the gross sum of eight hundred dollars, or at the rate of three dollars a cord; and if he did not choose to go on and take the whole, he was to pay three dollars and a half a cord for such as he should take. That the defendant was to proceed to cut and take away the wood immediately, without ceasing. That the defendant had three weeks to make his election to take the whole wood at eight hundred dollars or at the rate of three dollars a cord. That he chose the latter, and paid one hundred dollars when he had taken away thirty-three and one third cords. That he did not proceed to take the whole, but desisted after taking eighty-eight and one third cords.

Mr. F. S. Key, for the defendant, prayed the Court to direct the jury that the plaintiff could not recover upon that evidence in this action, upon this declaration.

But the COURT refused, on the authority of *Aubrey v. Aubrey*, at Alexandria; and said that where the contract of sale has been executed on the part of the plaintiff, and the agreement on the part of the defendant is to pay money, the plaintiff may maintain *indebitatus assumpsit*. See the cases cited in *Talbot v. Selby*, [ante, 181.] Bill of exceptions taken, but no writ of error prosecuted.

 McLaughlin v. Riggs.

VOSS v. VARDEN.

Upon an agreement to do certain brick work at twelve dollars a thousand, in a workmanlike manner, the plaintiff may recover, although part was not done in a workmanlike manner.

DECLARATION for work and labor. The plaintiff proved an agreement to do certain brickwork, in a workmanlike manner, at twelve dollars a thousand. The defendant proved that part of the work was not done in a workmanlike manner.

Mr. Caldwell, for the defendant, prayed the Court to instruct the jury that if they should be of opinion that the work was not done in a workmanlike manner, the plaintiff could not recover any thing.

But the COURT refused. DUCKETT, J., absent. ¶

 MAYOR AND COMMON COUNCIL OF WASHINGTON v. WHEAT.

Burning bricks in a clamp is not a violation of a by-law, making it penal to burn bricks in a kiln.

DEBT for penalty of one hundred dollars under a by-law of the corporation of 20th September, 1803, for using a brickkiln without license. The evidence was, that Wheat had agreed with one Weeding that Weeding should make and burn fifteen thousand bricks, to be delivered to Wheat, when burnt. That Weeding made the bricks and burnt them in a clamp, and not in a kiln.

The COURT directed the jury that if they believed the facts to be so, the defendant had committed no offence under the by-law. That it was no offence, under the by-law, to burn bricks in a clamp.

 McLAUGHLIN, Administrator, v. RIGGS.

Upon the issue "no rent arrear," the defendant is not bound to prove that the distress was laid by his order or authority.

The landlord may distrain after the death of the lessee.

REPLEVIN. Avowry for rent arrear — plea, no rent arrear and issue.

Mr. F. S. Key, for the plaintiff, moved the Court to instruct the jury that the defendant, to maintain the issue on his part, must prove that the distress was laid by himself or by some person by

him duly authorized; and that the defendant had no right to distrain after the death of Charles McLaughlin, the lessee.

But the COURT (*nem. con.*) refused.

UNITED STATES v. ISRAEL LITTLE.

The constable is not entitled to any fee on an execution not served.

INDICTMENT for taking illegal fees. The question was whether the constables are entitled to fifty cents for every execution returned, but not served. The Act of Congress says for every execution served and returned.

The COURT (*nem. con.*) decided that the constables were not entitled to any fee upon an execution unless it be served and returned.

UNITED STATES v. ISAAC NORRIS.

Where a statute merely alters the punishment of a common-law offence, the statutory punishment may be inflicted, although the indictment does not conclude *contra formam statuti*.

THE defendant was convicted of manslaughter upon an indictment for the murder of John Doyle, on the 17th of May, 1807, and a question arose whether, on a common-law indictment, the statutory punishment can be inflicted.

The judgment of the COURT was that he pay a fine of twenty dollars, and be imprisoned for twelve calendar months, including this day, (June 26, 1807,) and stand further committed until his fine and costs should be paid. This sentence was under the Act of Congress of 30th April, 1790, [1 Stat. at Large, 112.] The Court being unanimously of opinion that where the statute does not add any circumstance to the common-law description of the offence, but merely alters the punishment, it is not necessary that the indictment should conclude *contra formam statuti*, to authorize the Court to give judgment according to the statute.

The following opinion of CRANCH, C. J., was prepared but not read in Court, as DUCKETT, J., had some doubts as to some of the arguments therein used.

This is a verdict for manslaughter, on an indictment at common law for murder; and the question is, what punishment can the Court inflict? 1. It is a felony by the common law, but is within the benefit of clergy by 25 Ed. 3, St. 3, c. 4; and no subsequent statute having taken away the benefit, the party is entitled to it.

2. But sundry statutes have annexed certain conditions to its allowance to the secular clergy and to mere laymen. Thus by 4 Hen. 7, c. 13, a person not in orders was to be marked with a T on the brawn of the left thumb in open Court. And by the 18 Eliz. c. 7, § 3, he may be imprisoned at the discretion of the court, not exceeding one year; which was in lieu of the purgation and punishment which the ecclesiastical courts were supposed formerly to inflict. These statutes were all in force at the time of the first emigration to Maryland; and there is no doubt that the statute of 25 Ed. 3, c. 4, extending and confirming the benefit of clergy, was by experience found applicable to the local and other circumstances of the inhabitants. Nor is there any reason to doubt that the statutes of 4 Hen. 7, c. 13, and 18 Eliz. c. 7, § 3, were likewise found applicable. Many persons have been admitted to the benefit of clergy in Maryland, and burnt in the hand, which can only be done by virtue of the statute of 4 Hen. 7, and the subsequent statutes which explain the mode of marking to be by burning.

I am therefore of opinion that the courts in Maryland may, in their discretion, by virtue of the statute of 18 Eliz. c. 7, § 3, super-add imprisonment to the burning in the hand, upon allowing the benefit of clergy. Under the Act of Assembly of Maryland of 1793, c. 57, § 10 and 28, the courts of that State had, on the 27th of February, 1801, a power either to give judgment of burning in the hand, and imprisonment under the statute of Elizabeth, or, in their discretion, to sentence the offender to labor on the public roads; and that, in cases where the indictments did not conclude against the form of the statute.

Another question arises, whether the Court cannot lawfully render such judgment against the prisoner as is prescribed by the Act of Congress of April 30, 1790, [1 Stat. at Large, 113.] Under this head the first question, which arises, is whether that act is in force within the District of Columbia. Its words are, — “If any person shall, within any fort or other place, or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of manslaughter, and shall be thereof convicted, such person shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.”

The District of Columbia is a district of country under the sole and exclusive jurisdiction of the United States. *Primâ facie*, therefore, the law applies; and it has never been expressly repealed. It has been said to be impliedly repealed by the Act of 27th February 1801, [2 Stat. at Large, 103,] which adopts *in toto* the laws of Maryland. But the adoption of the law of Maryland would not have that effect unless the law of Maryland were either expressly or virtually repugnant to the Act of Congress of 1790.

But the provisions of the two laws are not repugnant to each other. By the Act of Maryland the punishment is burning in the hand and imprisonment, or hard labor. By the Act of Congress, fine and imprisonment. I imagine both laws may stand together, and the Court may adopt either mode of punishment in their discretion. This Court has often decided that larceny may be punished under this same Act of Congress, and such has been the constant practice ever since the change of jurisdiction.

But here we are met by what is called a settled principle of criminal law, that the Court cannot, upon a common-law indictment impose a statutory punishment. The authority relied upon is 2 Hawk. c. 25, § 116, who says, — “It seems that judgment on a statute shall in no case be given on an indictment which does not conclude *contra formam statuti*.” And again he says, in the same section, “it seems to be taken as a common ground, that a judgment by statute, shall never be given on an indictment at common law.”

These *dicta* seem to be only inferences which he draws by reasoning from analogy to the case of an action upon a statute; but he cites no case of an indictment in which the principle has been decided. If he is to be understood as the counsel for the prisoner seem to understand him, he is contradicted by the English every-day practice. By the 5 Anne, c. 6, a person convicted of theft or larceny may be committed to the house of correction, to be there kept at hard labor not less than six months nor more than two years; and by 4 Geo. 1, c. 11, and 6 Geo. 1, c. 23, felonious stealing of goods is punishable by transportation; and yet the indictments for those offences never conclude against the form of those statutes, although those punishments are generally inflicted; and there is no case in which the right of the court to inflict such punishments, upon such indictments, has been questioned. I understand Hawkins as referring only to such statutes as add some circumstance to the common-law definition of the crime. But where the statute uses only the common-law technical name or description of the offence, and declares it shall be punished in a certain manner, there the indictment need not conclude against the form of that statute to justify the infliction of the statutory punishment. The offence, in such case, is really not against the statute, but against the common law. The statute does not create the offence, nor add any circumstance to its description. The term used by the Act of Congress is simply “manslaughter,” the technical common-law name of the crime of felonious homicide, without malice prepense. So under the Act of Maryland, of 1793, it was never supposed necessary that the indictment should conclude against the form of the statute in order to authorize the

Court to impose the statutory punishment of hard labor. I am therefore of opinion that the Court may, in its discretion, sentence the prisoner to be burnt in the hand and imprisoned under the statute 18 Eliz. c. 7, § 3, or to hard labor upon the roads, under the Maryland law, or to fine and imprisonment under the Act of Congress.

UNITED STATES v. GODFREY DIXON.

Upon an indictment for burglary, the jury may find the prisoner guilty of larceny only.

Upon an indictment for larceny at common law, the Court may render judgment according to the statute.

The Court will suffer the prisoner to retract his plea of guilty in a capital case, and to plead not guilty.

INDICTMENT at common law for burglary, in the house of John Curran. The jury having retired, sent to the Court to know whether they could, upon that indictment, find the prisoner guilty of stealing only, and acquit him of the burglary. The Court having ordered the jury to be brought into court, told them, it was in their power to find a general verdict of guilty, or not guilty, or to find specially that the prisoner was guilty of a part only of the facts which go to constitute the crime of burglary; and that if they were not satisfied as to the breaking and entering the house in the night-time, they might so find their verdict, and that he was guilty of larceny only. Whereupon the jury retired, and in a short time returned a verdict, not guilty as to the breaking and entering the house in the night, but guilty of feloniously stealing the goods, &c.

Sentence, 39 stripes, and one dollar fine. The sentence was under the Act of Congress, of 30th April, 1790, § 16. [1 Stat. at Large, 116.]

MEM.—When Dixon was first arraigned he pleaded not guilty, and *Mr. Hiort* and *Mr. Key* were assigned as his counsel.

When called for trial his counsel informed the Court that he wished to withdraw his plea of not guilty, being satisfied that the proof of his confessions were too strong to admit of any hope, and that he thought it might be the means of his obtaining a pardon, especially as he was not the principal perpetrator of the act. Whereupon the Court explained to the prisoner the nature of his indictment, and stated the punishment to be death, and asked him whether he fully understood the nature of the charge against him and the punishment of the crime, to which he answered in the affirmative, upon which the Court suffered him to plead guilty, and remanded him.

On the 25th of June he was ordered into Court; and the Court again explained to him his offence and its punishment, and told him he had an opportunity, if he pleased, of retracting his plea, and of putting himself upon his trial; and asked him if he still persisted in pleading guilty, when he said he wished for a trial, and to plead not guilty. And the Court suffered him to withdraw the plea of guilty and put himself on his trial. The result of which is stated above.

CIRCUIT COURT OF THE UNITED STATES.

JULY TERM, 1807, AT ALEXANDRIA.

DARLINGTON v. GROVERMAN.

After oyer, and issue on the plea of payment, the plaintiff is not bound to produce the bond again.

DEBT on a bond. Oyer and plea of payment.

Mr. Young and *Mr. Taylor*, for the defendant, contended that the plaintiff was obliged to produce the original bond at the trial, and cited the Act of Assembly, p. 89, § 33; *Drummond v. Crutcher*, 2 Wash. 218; *Taylor v. Peyton*, 1 Wash. 252; *Evans v. Smith*, 1 Wash. 72; Act of Assembly, p. 11; *Peter v. Cooke*, 1 Wash. 257; *Governor of Virginia v. Turner's Securities*, [ante, 261, 286;] *Gordon v. Frazier*, 2 Wash. 130.

The COURT did not hear *Mr. Jones* in answer; but said that the only thing which could make a difference between the law here and at Washington is the Act of Assembly; and the Court does not perceive that that act requires a bond to be filed which is not produced in evidence. The issue is that the defendant has paid the money due on the bond, and the burden of proof lies on him. It is not incumbent on the plaintiff to give evidence of any fact admitted by the pleadings.

The Court said the point had been decided at the last term in Washington; and they thought the present case did not materially differ from that. After oyer and issue on the plea of payment the plaintiff is not bound to produce the bond again. The jury found a verdict for the defendant without any evidence of the payment, and the Court granted a new trial, without costs, upon the ground that the verdict was against law and without evidence.

DUCKETT, J., absent.

UNITED STATES v. JOSEPH VENABLE.

The delivery of counterfeit money to a person to be passed off generally, for the benefit of the prisoner is not a passing "in payment," within the Act of Assembly of Virginia of December 19th, 1792.

INDICTMENT for passing counterfeited coin, contrary to the Act

United States v. Custis.

of Virginia, December 19th, 1792, p. 249, whereby the passing of such coin, "in payment," is punishable with death.

The COURT, at the prayer of the prisoner's counsel, *Mr. Swann*, instructed the jury that if they should be satisfied, by the evidence, that the prisoner, knowing it to be counterfeit, passed the money to Brooke, with intent that Brooke should pass it away generally, for their joint benefit, or even for the sole benefit of the prisoner, it was not a passing in payment, within the meaning of the Act of Assembly, unless they should also be satisfied that the prisoner had given Brooke express orders to pay some certain debt due from the prisoner with that money, and the debt had been so paid; in which case, perhaps, there may be doubt. But if the prisoner passed the false money knowingly to Brooke, in payment for good money, it was a passing *in payment* within the meaning of the act.

DUCKETT, J., absent. Verdict, not guilty.

 UNITED STATES v. VENABLE, and UNITED STATES v. BROOKE.

After acquittal upon a charge of passing counterfeit money, "in payment," the Court will not order the prisoners to give security for their good behavior, although it should appear in evidence that they had uttered false money, as true.

Mr. Jones, Attorney for the United States, moved the Court, that the prisoners, who had been acquitted of passing counterfeit money, "in payment," under the Act of Virginia, of December 19, 1792, should be ordered to give security for their good behavior, it having appeared in evidence that they had uttered counterfeit money, but not "in payment."

Motion overruled. DUCKETT, J., absent.

 UNITED STATES v. G. W. P. CUSTIS.

An overseer of a road in Virginia, who has not been notified of his appointment, is not liable for the penalty of the Act of Virginia of 5th January, 1786, p. 27.

PRESENTMENT against the defendant, as overseer of the road, to recover the penalty of fifteen shillings, for neglect of duty, under the sixth section of the Act of Virginia, January 5, 1786, p. 27.

Mr. E. J. Lee, for the defendant, objected that there was no evidence of notice to defendant of his appointment. The Act of

Richardson v. Peyton.

December 10th, 1796, (p. 372,) required notice in a certain way, and the sheriff's return is to be conclusive evidence, and is the only evidence which the Court can regard.

The COURT discharged the defendant on the ground of want of notice. DUCKETT, J., absent.

WISE v. GROVERMAN.

If, after a plea of *nil debet*, by the appearance-bail, the principal comes in and gives special bail, and pleads the same plea, the plaintiff is entitled to a continuance of course.

THERE had been a plea of "owe nothing," by the appearance-bail and issue. The principal defendant now came in, and gave special bail, and pleaded the same plea, "owe nothing."

Mr. Jones, for the plaintiff, contended for a continuance, as a matter of course.

Mr. Youngs, for the defendant, cited the case of *Alexander v. Patten*, [ante, 338,] where the Court refused a continuance to the defendant, on account of the appearance of the administrator of the plaintiff.

But the COURT thought the plaintiff entitled to a continuance of course, in the same manner as on setting aside a writ of inquiry, it being the default of the defendant that he did not appear before.

Continued. DUCKETT, J., absent.

RICHARDSON v. PEYTON.

Parol evidence cannot be given of the contents of a letter written by the defendant to a stranger to the suit.

A bill of parcels, receipted by the defendant, is not, *per se*, evidence of an unexecuted contract to deliver the goods, but is *prima facie* evidence of a contract executed.

An action for money had and received, will lie for money paid by the plaintiff to the defendant, upon a contract which the defendant has failed to execute on his part.

ASSUMPSIT, for money had and received, and for non-delivery of flour on a contract.

The COURT refused to suffer the plaintiff to give parol testimony to prove the contents of a letter, written by the defendant to Craven Thompson, who was no party to this suit.

The plaintiff produced a bill of parcels :

"Messrs. R. & W. P. Richardson Bought of T. W. Peyton, (so many barrels flour, amounting to \$287 ⁷⁵/₁₀₀.)

"Received payment, T. W. PEYTON."

Oxley v. Tucker.

Mr. Jones, for the defendant, prayed the Court to instruct the jury, that this paper did not contain evidence of a contract to deliver flour, but was *primâ facie*, though not conclusive, evidence of a contract executed.

And the COURT so instructed the jury.

Mr. Jones then prayed the Court to instruct the jury, that the plaintiff could not recover in this action upon the evidence. 1st. Not on the count for money had and received, because the defendant never did receive it to the use of the plaintiff, but to his own use. 2d. Not on the special count for non-delivery of the flour, because the bill of parcels is evidence of a contract executed.

The COURT (DUCKETT, J., absent,) refused to hear *Mr. Swann* in reply, and said the point had been often decided, that if a contract be not complied with on one part, and the other party had paid his money, he may disaffirm the contract, and recover back his money in an action for money had and received.

Verdict for the plaintiff.

The defendant took a bill of exceptions, but did not bring a writ of error.

ELLICOTT *et al.* v. G. CHAPMAN.

Original entries in the handwriting of a deceased clerk, must be produced. It is not sufficient to give a copy in evidence.

ASSUMPSIT for money lent and advanced, had and received, goods sold, &c.

The COURT refused to admit evidence that certain original entries in the books of the plaintiff, (a copy of which entries only in the handwriting of the witness was produced on the trial,) were in the handwriting of a deceased clerk, because the original entries were not produced. The Court refused to permit an account made out in the handwriting of a deceased clerk to be given in evidence, although it was said that the original entries were in the handwriting of the same deceased clerk. The Court said the original entries must be produced.

OXLEY, Assignee of Thomas Moore, v. JOHN and JAMES TUCKER.

A defendant cannot, under the Bankrupt Law, set off a debt due to him from a partnership, against a claim by the assignee of one of the firm who became bankrupt.

ASSUMPSIT by the assignee of Thomas Moore, a bankrupt.

The defendants offered to set off a debt due to them by Henry and Thomas Moore.

Mr. C. Simms, for the defendants, cited the 42d section of the Bankrupt law, [2 Stat. at Large, 19,] 1 Esp. 117; 1 Atk. 133. Partners are jointly and severally bound. A separate commission may issue against one partner, upon a partnership debt; consequently a joint debt may be proved under a separate commission. At the dissolution, Thomas was authorized to settle the partnership affairs, and has testified that at the time the defendants purchased the goods, he intended they should go in discharge of the debt due.

Mr. Jones, contra. A separate commission may issue upon a joint debt, but if it issue on an individual debt, individual creditors only can come in and prove under that commission, until all the separate debts are paid. A partnership is not bound to pay the individual debt. Cook's Bankrupt Law, 237, 568, 582; *Ex parte Elton*, 3 Ves. 238.

A verdict was taken for the plaintiff, subject to the opinion of the Court upon the following facts: Henry and Thomas Moore were indebted to the defendants in \$106. The defendants were indebted to Thomas Moore, after the dissolution of the partnership, and before the bankruptcy, in \$113. Thomas Moore was authorized by his partner to settle the partnership concerns, collect the debts due to the partnership, and pay the debts due from the partnership, as far as the joint funds would extend. After the dissolution, the defendants, knowing thereof, and that Thomas Moore was carrying on business on his separate account, at several times purchased of Thomas Moore, goods to the amount of \$113. Thomas Moore, being examined as a witness, proved that it was his intention, at the time of selling those goods to the defendants, to give them credit for the joint debt due from Henry and Thomas Moore; but nothing was said or agreed on the subject between them, nor was such credit ever given before his bankruptcy.

The Court (*nem. con.*) gave judgment for the plaintiff, because it appeared to be a naked case of set-off of debts due in different rights. And although a joint debt may be proved under a separate commission, yet it is only to enable the joint creditor to come in for his share of the surplus, after payment of the separate creditors.

This judgment was reversed by the Supreme Court, (5 Cranch, 34,) because a defendant may set off a joint debt by virtue of the Bankrupt Law.

HARTSHORNE, Receiver of Mandeville's Estate, v. McIVER,
Assignee of James Gillis, a Bankrupt.

If a creditor has obtained judgment at law upon the notes of a third person, assigned to him by his debtor as collateral security, his right to resort to that security is not taken away by judgment against his debtor and judgment on *scire facias* against the bail and arrest and discharge of that bail on a *capias ad satisfaciendum*.

ISSUE directed by chancery to try the question whether Hartshorne, as receiver, &c., be a creditor of the estate of Gillis, and to what amount. Moorehouse & Company were indebted to Mandeville, and gave him William Armstead & Company's notes as collateral security. James Gillis, the bankrupt, was one of the house of Armstead & Company. Moorehouse was taken in Philadelphia, and gave Charles Young as special bail. There was judgment against Moorehouse & Company, and a *capias ad satisfaciendum* returned *non est*; *sci. fa.* and *ca. sa.* against the bail, upon which the bail was taken and discharged out of custody by order of Mandeville.

Mr. Taylor and *Mr. Youngs*, for the defendant, contended that the arrest and discharge of Charles Young, discharged the debt of Moorehouse & Company, for which he was liable as bail; and that therefore the notes of Armstead & Company ought to be returned to Moorehouse & Company; and cited the Act of Virginia, p. 160; 1 Cro. 851; *Williams v. Cutting*, 2 Cro. 136, 143; 10 Vin. 579; Esp. N. P. 196; *Vigers v. Aldrich*, 4 Burr. 2482; *Jacques v. Willy*, 1 T. R. 557; 1 Call, 18, 21; *Higgins's case*, 2 Cro. 320; *Higgin v. Summerland*, 2 Bulst. 68.

Mr. C. Lee, *contrà*, cited *Heylin v. Ulmhall*, 2 W. Bl. 1235; *Freeman v. Freeman*, 2 Cro. 548; 1 Com. Dig. 502; 1 Sid. 107; 2 Bulst. 68; 3 Com. Dig. 311; 1 Vent. 315; 10 Vin. 578, tit. Execution; T. Raym. 73; 1 Lev. 95.

PER CURIAM. DUCKETT, J., absent.

The question really is, whether Gillis's estate is liable to Mandeville or to Moorehouse. Gillis is a mere stakeholder. Moorehouse claims the notes of Gillis, because his own bail has been imprisoned and discharged by Mandeville, although neither he himself, nor his bail, have paid the debt for which Gillis's notes were pledged. This, therefore, must be a most ungracious claim, a claim founded upon no principle of equity. Mandeville has a judgment at law upon the notes, and if the bankruptcy of Gillis had not intervened, must have been left to pursue his remedy at law. Without deciding whether the release of the bail, discharges the principal, nothing is more clear than that the discharge of Moorehouse, without an equitable satisfaction, cannot

Mulatto Lucy v. Slade.

prevent Mandeville, or his representative, from pursuing his legal remedy against Gillis. Mandeville has a clear title at law under the judgment, and it would be inequitable that Mandeville should be obliged to give up the security until his debt is paid.

The COURT was also of opinion that Mandeville was not bound to pursue his remedy against the bail of Moorehouse, to enable him to resort to the other collateral security, the notes of Gillis.

UNITED STATES v. BUTLER.

If a witness appear in court at the term mentioned in his recognizance, and no default be entered against him at that term, and the recognizance be not respited, he is not bound by the recognizance to attend at the following term, although the cause should be continued.

SCIRE FACIAS against a surety of a witness, bound by recognizance to appear at June term, 1804, and not to depart without leave of Court. The breach assigned was that the witness failed to appear according to the recognizance. Upon the trial of the issue the evidence offered, to show the breach, was a record of November term, 1804, stating that the witness was called and failed to appear. There was no record of the respite of the recognizance, nor of a continuance of it, nor of any order for the witness to attend again. It appeared, upon the record of June term, that the witness was allowed for four days' attendance on the prosecution at that term.

The COURT (*nem. con.*) said that the record of the default of the witness at November term was not evidence of a breach of the recognizance by not appearing, unless there was a record of a respite, &c., and even then it was doubtful whether the breach assigned should not be that the witness had departed without leave of the Court.

Verdict for the defendant.

MULATTO LUCY v. CHARLES SLADE.

A deed conveying or transferring a slave in Maryland, not recorded, cannot be given in evidence without proof of its execution, although it has been acknowledged before a justice of the peace in Maryland.

The oath, required by the Virginia law of the 17th of December, 1792, § 4, is of no avail unless taken within sixty days after the removal of the party.

TRESPASS, for assault and battery and false imprisonment, to try the right of freedom.

Mr. E. J. Lee, for the defendants, offered a deed of gift of the plaintiff by Colonel William Lyles to Miss Ann Lowery, whom W. H. Lyles afterwards married, acknowledged before Mr. Bowie, a justice of the peace of Prince George's county, Maryland, and a certificate of the clerk of Prince George's county, that Mr. Bowie was on that day a qualified justice of the peace, and a certificate of J. M. Gantt, chief judge of the court of Prince George's, &c.

Mr. Jones, for the plaintiff, objected that it is no act, nor record, nor a judicial proceeding. It is not recorded, and if it had been, yet as it is not required to be recorded, it would gain no authenticity by the recording. It is not necessary to be acknowledged. The taking of an acknowledgment is not a judicial act.

The COURT (*nem. con.*) decided that it was not evidence, unless proved by witnesses. The acknowledgment of the deed, at all events, can amount to no more than an estoppel against the party himself, who has acknowledged, and does not prevent another person from denying the execution of the deed.

The Court also permitted the plaintiff to give evidence of an importation by Colonel William Lyles, under a general allegation in the statement of the case, prepared by counsel under the order of the Court; whereupon the defendant gave in evidence a certificate of an oath taken by William H. Lyles; but the Court instructed the jury that the said oath was not in compliance with the Virginia Act of Assembly of 17th December, 1792, § 4, p. 86, unless taken within sixty days after the removal of W. H. Lyles.



McIVER, Assignee of Gillis, v. W. WILSON.

A bond due from the bankrupt to the defendant cannot be set off against the defendant's note to a third person assigned to the assignee of the bankrupt's effects after commission issued.

ASSUMPSIT on a promissory note of Wilson to J. Kennedy, dated the 15th of October, 1805, at 20 days, indorsed by J. Kennedy to McIver, assignee of the effects of Gillis, a bankrupt. The defendant offered to set off a bond of Gillis to W. Wilson and Roger Coltart, who is dead, dated 15th of September, 1795, and payable the 15th of March, 1796. The note was given since the date of the commission. The declaration is by McIver as assignee of the effects of Gillis.

The COURT (*nem. con.*) Clearly, it was not a mutual credit before the bankruptcy, and therefore cannot be set off under the Act of Congress.

McIVER, Assignee of Gillis, v. JAMES KENNEDY.

Under the laws of Virginia, in an action against the indorser of a promissory note, the plaintiff, to excuse himself for not having first brought suit against the maker, must show him to have been insolvent at the time of bringing the suit; and in order to recover, must have given reasonable notice of the non-payment by the maker; and the jury is to decide whether the notice was reasonable.

A deed of land in Maryland cannot be read in evidence unless recorded in Maryland.

ASSUMPSIT upon W. Wilson's note, indorsed by the defendant to the plaintiff, as assignee of McIver's estate. 1st Count on the assignment of the note, setting forth that the maker, W. Wilson, was insolvent at the time of the suit brought. 2d Count for money had and received.

The COURT decided, (doubtfully,) that the plaintiff must prove the maker of the note insolvent at the time of bringing the action; that the plaintiff must prove reasonable notice to the indorser, of the non-payment by the maker; and that the jury were to decide whether the notice was reasonable.

The COURT refused to permit the defendant to read in evidence (to prove the solvency of W. Wilson,) a deed of land in Washington county, Maryland, certified by T. Williams, (who calls himself clerk of Prince William county, in Virginia,) to have been proved in the latter county, but not recorded in Washington county in Maryland, according to the laws of Maryland.

Ex Parte ROBERT SPROUT and THOMAS BAILEY.

A warrant of commitment must state probable cause, supported by oath; must be under seal, and must limit the term of imprisonment.

A voyage is not ended until the cargo and ballast are discharged.

Quære, whether the authority to commit a seaman for deserting his ship is not limited to a justice of the peace.

HABEAS CORPUS. It appeared by the return that they were committed by virtue of the following warrant.

"*Alexandria County ss.* You are required to receive into your jail and custody, Robert Sprout and Thomas Bailey, two sailors belonging to the ship *Alexandria*, Captain William Weston, they being charged for neglect of duty on board, rioting and threatening to take the life of their captain and mate contrary to law. Given under my hand this 14th day of July, 1807. A. Faw. Captain James Campbell, Jailor."

Captain Weston appeared and prayed that they might be now committed, and grounded his motion on the following affidavit, viz.:—"This is to certify that Robert Sprout and Thomas Bai-

ley, seamen belonging to the ship Alexandria, under my command, did on the 14th day of July, 1807, desert from the said ship without leave of absence. W. Weston. Sworn to in Court. 16 July, 1807. G. Deneale;" — and produced the shipping-articles; and it was admitted that the cargo was not discharged.

Mr. Youngs, for the prisoners, contended that the voyage was ended as soon as the vessel arrived in port, before she had discharged her cargo; and that the remedy given to the master by the Act of Congress of July 20, 1790, § 7, [1 Stat. at Large, 134,] for confining the seaman, does not apply to the period of time between the arrival and the discharge.

The Court discharged the prisoners on the ground of the defects in the warrant of commitment. It not being on oath, no time of imprisonment limited, and not under seal.

The Court refused to commit them again on the affidavit of the master, because they doubted whether the authority was not limited to a justice of the peace.

But the Court was clear that the voyage contracted for was not ended until the discharge of the cargo and ballast, if required.

PATTERSON'S EXECUTORS v. BOWIE & BALL.

A ne exeat will not lie, under the laws of Virginia, to restrain a garnishee from going out of the District of Columbia.

MOTION to discharge a *ne exeat* issued against Bowie, as garnishee of Ball.

Mr. W. Herbert, Jr., for the garnishee, Bowie, contended that the Act of Virginia, of 26th of December, 1792, p. 115, provides for the case of restraining the garnishee from paying away the money, &c., by authorizing the Court to require security, or by ordering the property to be given up to the plaintiff. A *ne exeat* does not lie against any but the principal debtor himself. 2 Har. Ch. Pr. 202–210. The affidavit is by Mr. Swann, who only swears that he believes the allegations of the bill to be true.

Mr. Swann, *contra*, in support of the *ne exeat*. The original bill expressly charges that Bowie was indebted to Ball in three hundred and fifty dollars. Originally the *ne exeat* was a high prerogative writ, and supposed to issue only by order of the crown. But afterwards it issued in favor of a creditor. Wherever there would otherwise be a failure of justice the Court of Chancery will award it. It is not merely confined to a debtor, but may be issued against a person who may become liable by reason of his having property in possession which the plaintiff can subject to the pay-

ment of his debt. *Jerningham v. Glass*, 3 Atk. 409; 2 Har. Ch. Pr. 207. If the Court has a right to order the property to be delivered over to the plaintiff, upon the return of the process, the Court has a right and power to prevent its removal before return of process. By the Act of Virginia, 29th November, 1792, § 50, p. 67, a judge out of court may grant a *ne exeat*, and by the Act of 23d January, 1798, § 4, p. 375, he may discharge it. If the judge has not such a power, the attachment will be a mere notice to the garnishee to go out of the district with the effects. The affidavit is sufficiently certain; but if not, the answer of Bowie, supplies the defect, by not denying the allegation that he is indebted to the principal debtor, and by acknowledging that he had a vessel of Ball's in his possession at the time of the service of the subpoena. This Court decided, in *Patterson v. M'Laughlin & Barney*, in December, 1806, [*ante*, 352,] that the *ne exeat* would lie against an administrator.

Mr. Youngs, in reply. 1. It will not lie against any but a debtor of the plaintiff. There is a difference between executors and garnishees. An executor is the only person against whom the plaintiff can recover. He is debtor to the amount of assets. The form of the writ shows that it must be a debt due from the defendant to the plaintiff. 2. The affidavit does not state positively a debt due from the principal debtor to the plaintiff nor from the garnishee to the debtor. 3. It is a personal writ; the garnishee cannot discharge the *ne exeat* by delivering up the property. There is no sum to guide as to the amount of security required, but the amount of the principal debt; the garnishee may not have any effects, or a very small sum. The garnishee is in no fault; but a debtor is in fault, and therefore it is right his person should be secured. So an executor who is going away with the goods. The statute for attachments provides for the case, and must be pursued. No other mode can be taken.

The COURT can only require security to restrain the garnishees from paying away, &c. A judge out of court cannot make the order. The judge cannot give the marshal an alternative to take the *ne exeat* bond or receive the goods. The mode of restraint prescribed by the act is an exclusion of all other modes. The affidavit of Mr. Swann goes only to his belief of three facts, namely, that another bill has been filed to attach, &c., that Bowie is indebted to Ball, and that Bowie is going out of the District of Columbia. Executors and administrators only are entitled to swear to their belief.

The COURT (*nem. con.*) quashed the *ne exeat* with costs of the motion, and ordered the bond to be cancelled. 1st. Because the affidavit was insufficient; and 2d. Because a *ne exeat* ought not to issue against a garnishee.

Gunnel v. Dade.

FITZHUGH, J., *contrà*, as to the 2d ground, thinking there might be cases in which there would be a defect of justice if a *ne exeat* could not issue.

GUNNEL v. DADE.

The plaintiff, to whom a negro has been sold, without title, cannot recover the purchase-money in an action for money had and received, without proof that he returned or offered to return the negro; nor if there was a bill of sale under seal with an express warranty of title.

THIS was an action for money had and received, for the price of a negro sold by the defendant to the plaintiff, without title. The plaintiff, on the evening before the trial, gave notice to the defendant to produce a deed of trust including the negro in question. The affidavit of service stated the service on the defendant and his promise to produce the deed.

Mr. E. J. Lee, for the plaintiff, (under the 15th section of the Judiciary Act of 1789,) [1 Stat. at Large, 82,] moved the Court for judgment by default in not producing it.

But the COURT refused; because there was no affidavit that the deed was in possession of the defendant, and although the defendant promised to produce it, yet that was not sufficient; the presumption is that the deed is in the possession of the trustees, who are entitled to the possession; and because the notice ought to be of a motion to the Court to require the defendant to produce the paper; and such an order of Court must be served on the defendant, and disobeyed, before the Court can give judgment by default.

Mr. Taylor and *Mr. Noblet Herbert*, for the defendant, moved the Court to instruct the jury, that the plaintiff cannot recover upon the warranty, in this action for money had and received; and cited *Lindon v. Hooper*, Cowp. 414; *Power v. Wells*, Id. 819; *Stuart v. Wilkins*, Doug. 18; *Weston v. Downes*, Id. 23; *Towers v. Barrett*, 1 T. R. 133; *Fielder v. Starkin*, 1 H. Bl. 17.

They contended that an action for money had and received will not lie unless the consideration has totally failed; nor unless the plaintiff had returned or offered to return the negro to the defendant; nor if there was an express warranty of title by a written bill of sale.

Mr. E. J. Lee, and *Mr. Swann*, *contrà*, cited *Moses v. McFarlon*, 2 Burr. 1005; *Towers v. Barrett*, 1 T. R. 133; *Morgan's Essays*, 143, 144; *Astley v. Reynolds*, 2 Str. 915; 1 Esp. N. P.; *Shove v. Webb*, 1 T. R. 732; *Stratton v. Rastall*, 2 T. R. 370; *Power v. Wells*, Cowp. 819; *Weaver v. Bentley*, 1 N. Y. T. R. 47.

Vowell v. Lyles.

The COURT (*nem. con.*) instructed the jury that the plaintiff cannot recover in this action unless they should be satisfied, by the evidence, that the plaintiff, before the suit brought, returned or offered to return the negro, or that the defendant had waived such return or offer. And that if the jury should be satisfied, &c., that the bill of sale contained a general warranty of the title under the seal of the defendant, the plaintiff could not recover in this case.

VOWELL v. W. H. LYLES.

In an action in Virginia, by the indorsee against the indorser of a promissory note, if the maker is insolvent, it is not necessary that the plaintiff should have first sued the maker, although at the time of bringing the suit, the maker had in his hands, goods and chattels more than enough to pay the debt.

• If the defendant indorsed the note to give it credit, no other consideration is necessary to support the action.

A special demurrer brings into question the substantial validity of the pleading of the demurring party.

A blank indorsement may be filled up at the bar, after the jury is sworn; and the indorsement so filled up is *prima facie* evidence of a good consideration.

ASSUMPSIT by indorsee against his immediate indorser of a promissory note.

1st Plea: That at the time this suit was brought G. N. Lyles, the maker of the note, had in his hands goods and chattels more than enough to pay this debt. Replication, that the said G. N. Lyles was at that time insolvent.

Special demurrer: 1st. Because the replication is no answer to the plea. 2d. Because it is a departure. 3d. Because the plaintiff has not demurred, nor joined issue.

2d Plea: That neither the defendant, nor any person for him, ever received any value or consideration of any kind whatsoever, of or from the plaintiff, or any other person whatsoever, for or on account of the note of the said G. N. Lyles, or for or on account of the indorsement and assignment of the said note.

Replication, that the note was drawn payable to the defendant, and on the same day indorsed by him; and that such indorsement was made by him for the purpose of giving credit to the note; and that after the note was so indorsed, to wit, on the same day, it was, "for a fair and valuable consideration transferred and delivered to the plaintiff, who accepted and received the note so indorsed as aforesaid, as well upon the credit of the indorser aforesaid, as upon the credit of the maker, G. N. Lyles.

Special demurrer. 1st. Because the replication is no answer to the plea. 2d. Because it does not admit or deny that no consideration passed, &c., for the indorsement. 3d. Because it neither takes issue nor demurs to the defendant's plea.

3d plea, *non assumpsit*; and issue.

Mr. Youngs, for the defendant, contended that he was not bound to show his pleas to be substantially good, upon his own special demurrer to the plaintiff's replication; and that the only question was whether the replication was bad.

PER CURIAM, (*nem. con.*) If your pleas are substantially bad, the judgment must be against you upon your own demurrer.

The first plea is bad in substance; it does not show the solvency of the maker; and is no answer to the charge of his insolvency, as alleged in the declaration.

Upon the second demurrer, the COURT (*FITZHUGH, J., contrà,*) adjudged the replication to be good, inasmuch as it showed a good consideration.

The indorsement being for the purpose of giving credit to the note, and the plaintiff having passed away a valuable property upon the credit so given to the note, a good consideration flowed from the plaintiff to the defendant.

On the trial of the issue of *non assumpsit*, —

Mr. Youngs, for the defendant, objected to the note, with a blank indorsement of the defendant, being read in evidence, and also objected to the plaintiff's attorney filling it up at the bar after the jury was sworn.

But the COURT (*nem. con.*) suffered it to be so filled up, and then read to the jury.

Mr. Youngs then prayed the COURT to instruct the jury in effect, that the plaintiff must prove a consideration by other evidence than the said indorsement, so filled up.

But the COURT, (*FITZHUGH, J., contrà,*) refused, and instructed the jury that the indorsement, so filled up, was *prima facie* evidence of a consideration, and threw the burden of proof on the defendant. The defendant took a bill of exceptions, but did not prosecute a writ of error.

WHEATON v. LOVE.

Under the law of Virginia respecting the taking of depositions, notice to the attorney at law of the opposite party is not sufficient.

NOTICE of taking a deposition under the Virginia laws, was given to *E. J. Lee*, attorney at law for the defendant.

Mr. E. J. Lee, acknowledged service, but stated that he could not attend.

Mr. E. J. Lee, now objected to the deposition, because notice to an attorney at law is not good under the laws of Virginia. *Budicum v. Kirk*, 3 Cranch's Rep. 297.

Mr. Swann, for the plaintiff, became nonsuit; and the Court reinstated the cause on payment of the costs of the term. The

deposition having been taken under the former decisions of this Court that such notice was good. (DUCKETT, J., *contrà*.) [*post.*]

BARNES v. LEE, Special Bail of D. Easton.

The record of a cause, is the history of the proceedings in an action made out at full length, and in technical language; and when once made out and written in the record book the power of the clerk over it has ceased. It has become a public document and cannot be altered, unless by order of the Court under certain circumstances.

The plea of *nul tiel record* refers to the time of the plea pleaded, and a subsequent amendment of the record does not affect the issue.

A material variance between the record of the recognizance and the recital of it in the *scire facias*, is fatal.

SCIRE FACIAS against Mr. Lee, as especial bail for David Easton.
Mr. Jones, for the plaintiff.

Mr. E. J. Lee and *Mr. F. Lee*, for the defendant, cited the following authorities: — Com. Dig. tit. Pleader, L. 3, Bail, R. 2–7, Record, C.; *Coy v. Hymas*, 2 Str. 1171; *Vavasor v. Bailie*, 1 Salk. 52; *Kilbourn v. Trot*, Cro. Eliz. 855; *Shuttle v. Wood*, 2 Salk. 564; *Ward v. Griffith*, 1 Ld. Raym. 83, 84; *Knight's case*, Salk. 329; S. C. Ld. Raym. 1914; 21 Vin. 17, Trial; *Hillier v. Frost*, 1 Str. 401; *Grey v. Jefferson*, 2 Str. 1165; 2 Crompt. Prac. 73.

December 18th. CRANCH, C. J., delivered the opinion of the Court.

To this *scire facias* Mr. Lee has pleaded *nul tiel record*, upon which an issue is joined, which must be decided by the Court upon inspection of the record. If there be such a record as that set forth in the *scire facias* the judgment must be for the plaintiff. But if there be a material variance between the record and the recital of it in the *scire facias* the judgment must be for the defendant.

The first question is, what is the record? The record as made up at large in the record-book is in these words: "Whereupon Edmund J. Lee came into court and undertook for the said defendant to satisfy and pay the condemnation of the Court, if he should be cast at the trial of this suit, or render his body to prison in execution for the same."

The *scire facias* states, "Edmund J. Lee heretofore," "to wit, on," &c. "came before the Court and became pledge and bail for the said David Easton, that if it should happen that the said David Easton should be convicted at the suit of the said John Barnes in the action aforesaid, then the same bail granted that as well the said damages as all such costs and charges as should be adjudged to the said John Barnes in that behalf should be made of the goods and chattels of the said Edmund J. Lee, and to be levied

to the use of the said John Barnes, if it should happen that the said David Easton, should not pay the said damages and costs aforesaid, or should not on that account render himself to the prison of our said county."

It is contended, by the defendant, that the undertaking, as stated in the record, is materially variant from that set forth in the *scire facias*, because the former does not show that the defendant "granted that the damages and costs should be made of his goods and chattels" in case Easton did not pay them or render himself to prison on that account. The undertaking of the defendant, as stated in the record, is only that Easton should pay or render himself to prison; it does not include the usual alternative "or that the bail will pay it for him," which is the very substance and essence of the undertaking upon which the *scire facias* is grounded.

But it is answered, on the part of the plaintiff: 1st. That the obligation of special bail is well known and settled by law, and cannot be altered, and when the record states that he came into court and acknowledged himself to be special bail, it states in substance that he acknowledged himself to be bound by all the legal obligations of bail; and that when the record states that he undertook for Easton to pay or render himself to prison, in execution, it implies that if he did not, the bail would do it for him; so that the record states the substance of the whole legal obligation of special bail, and the *scire facias* has stated nothing more. 2d. It is also contended that the entry on the minute-book of the day, in these words, "Edmund J. Lee, special bail," authorized the clerk to make up the records of the recognizance of bail in the legal form, and in no other. That the true records of the court are the minutes extended into form, according to their legal import. That if the clerk has erroneously extended the minutes in this case, it is as if he had done nothing; and that the record may now be made up in due form, when it will exactly correspond with the *scire facias*. There is much ingenuity and seems to be some weight in this argument, and it brings us back to the question what is the record in this case?

The daily minutes, taken by the clerk and sanctioned by the Court, are only memoranda to assist the memory of the clerk in making up the records of the court. The record is the history of the proceedings in an action made out at full length and in technical language. When the clerk has once made out this history and written it in the record-book, his power over it ceases. It has become a public document, and cannot be altered unless by order of the Court, under certain circumstances. The record therefore to which the Court is referred by the issue in this case, I take to be that which is entered at length, in the record-book,

and although the Court may perhaps order a clerical error to be corrected, yet such correction now made could not affect the issue in this case, which must be decided according to the record as it stood at the time of the plea pleaded. This principle seems to be settled by the cases of *Coy v. Hymas*, 2 Str. 1171; *King's case*, 2 Ld. Raym. 1014, and Salk. 329; *Hillier v. Frost*, 1 Str. 401, and *Gray v. Jefferson*, 2 Str. 1165.

If, then, the record in the record-book is that which we are to compare with the *scire facias*, the question remains whether there be a substantial variance between them. That there is apparently such variance seems to be admitted; but it is said that when a man undertakes that another shall do a thing, if this other fails to do it, there is an implied obligation on the part of the former that he will do it for him. This may perhaps be true in some cases of contract, and such implied obligation may perhaps support an action; but it does not therefore follow that such implied obligation can arise upon a recognizance, nor that it will authorize an execution to issue without a previous judgment. A recognizance is a solemn acknowledgment upon record, and contains all the terms of the obligation which the party takes upon himself. In the present case the Court deems the omission of the usual alternative, ("or that he will do it for him") to be fatal. I have a doubt whether, if the plaintiff chooses to quash his *scire facias* and then apply to have the record amended, I should not think it ought to be amended; and that he might then bring a new *scire facias* upon the amended record. But upon this last point the Court has not made up an opinion.

YOUNG & DEBLOIS v. BLACK.

Upon a joint shipment and orders by three persons, the master is not liable to an action by two of them only, for breach of those orders, unless he has expressly promised to pay them their proportion of the damages.

ASSUMPSIT for disobedience of orders.[†] The first count of the declaration stated a cargo shipped jointly by plaintiffs and one Lawrason, and joint orders from all three, and an express promise in writing by the defendant to obey those orders; and a breach of the orders; and averred that if the defendant had obeyed the orders and brought in a cargo of salt, the profit of the plaintiffs on the sale of that salt would have been fourteen hundred and thirty-five dollars; by reason whereof the defendant became liable to pay that sum to the plaintiffs, and being so liable, the defendant, in consideration thereof, promised the plaintiffs to pay that sum

Pierce v. Turner.

to them on demand. The second count was like the first, but upon another breach of the orders. The third, was *indebitatus assumpsit* for goods sold and delivered. The fourth, money had and received. The fifth, *insimul computasset*.

The COURT, upon the prayer of Mr. Swann, for the defendant, decided (*nem. con.*) that the plaintiffs, Young and Deblois, could not recover without evidence of an express promise to pay them their proportion of the damages for the breaches alleged. And that the orders, &c. were not evidence of such express promise, nor were they evidence on either of the three last counts. The plaintiffs became *nonsuit*.

 WILSON v. MANDEVILLE & JAMIESON.

The Statute of Limitations, does not apply to accounts between merchants.

ASSUMPSIT for goods sold and delivered. Pleas general issue, and limitation of five years. Virg. law, 19th Dec., 1792, § 4, p. 107.

Mr. E. J. Lee, for the plaintiff, moved for leave to withdraw the general replication and put in a special replication, that the money in the several promises, &c., became due "on trade and merchandise had between the plaintiff and defendants as merchants, and wholly concerned the trade of merchandise." This replication was taken *verbatim* from that in *Webber v. Tivil*, 2 Saund. 122.

Mr. Lee, cited *Scudemore v. White*, 1 Vernon, 456; *Chievly v. Bond*, 4 Mod. 105; *Catling v. Skoulding*, 6 T. R. 189.

Mr. Youngs, for the defendant, contended that the exception in the statute applies only to actions of account.

The COURT permitted the general replication to be withdrawn and the special replication to be filed, being of opinion that the exception did not apply to actions of account only, but to *assumpsit* upon open accounts. See the cases cited in notes to the case of *Webber v. Tivil*, 2 Williams's Saunders, 124.

 PIERCE v. TURNER.

A clerical mistake in entering a judgment may be amended at a subsequent term, and an execution issued thereon may be quashed.

THIS was a motion to set aside a judgment of last term, obtained by mistake of the clerk in entering an appearance of

Brent v. Justices of the Peace.

R. I. Taylor, and a confession of judgment in this suit, instead of another, and to quash the execution thereon, there being a good defence — the defendant being sued as executrix *de son tort* for holding negroes under a marriage settlement.

Mr. Swann, for the plaintiff, admitted the facts.

Judgment set aside, and execution quashed.

But *DUCKETT, J.*, doubted whether the Court could, at this term, set aside a judgment of the last term, even upon a clerical mistake.

D. C. BRENT, Marshal of District of Columbia, v. THE JUSTICES OF THE PEACE.

The marshal of the District of Columbia is entitled to a fee of five dollars and fifty cents for summoning and impanelling a coroner's inquest in the county of Alexandria, to be paid by the county.

THIS was a rule on the justices of Alexandria county, to show cause why a mandamus should not issue against them as a board of commissioners for the taxes of the county, commanding them to settle the marshal's account, and allow him five dollars and fifty cents for summoning and impanelling each coroner's jury, by order of the coroner, they having allowed him only three dollars and fifteen cents, according to the Act of Assembly of Virginia.

By the Act of Congress of 28th of February, 1799, c. 125, § 1, [1 Stat. at Large, 624,] the marshal is entitled to four dollars for summoning each grand and other jury, and for all other services not therein enumerated such fees as are allowed in the Supreme Court of the State. Impanelling a jury is not one of the services enumerated in the Act of Congress. But the sheriff's fee in Maryland, for that service, was ninety pounds of tobacco, valued at one dollar and fifty cents, which, added to the four dollars allowed by the Act of Congress, makes up the fee of five dollars and fifty cents.

By the law of Virginia, the coroner's fees for an inquest of death, were a charge upon the county; and the sheriff's fee for summoning a jury of inquest, was three dollars and fifteen cents.

Mr. C. Simms showed cause and contended — 1st. That the levy court is not bound to provide for the payment of the coroner's expenses, because the county is not liable to pay. 2d. In the Act of Congress of 28th of February, 1799, grand and other juries mean juries in court. That act does not apply to a coroner's jury. 3d. That summoning and impanelling are not distinct services, there being no fee in Maryland for summoning, separate

from impanelling. 4th. That the marshal cannot summon a coroner's jury. It ought to be summoned by a constable. The marshal is not bound to perform the duty of a sheriff.

Mr. E. J. Lee, contra, contended that, — 1st. This was a charge against the county, under the law of Virginia. 2d. That the Act of Congress means *any* juries which the marshal is bound to summon. 3d. That the marshal is bound to perform all the duties of a sheriff of Virginia.

Mandamus nisi, awarded. See the case of *United States v. McDonald*, Washington, March, 1802, [*ante*, 78,] in which the Court decided that the marshal was entitled to the ninety pounds of tobacco for impanelling a jury.

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E. J. LEE, Trustee for Kennedy, v. PATRICK RAMSAY.

A parol gift of a slave in Virginia in 1784, was void under the statute of 1758, although possession accompanied and followed the gift, and it was not made valid by the act of 1787.

A legacy of a slave, gives no title till assented to by the executor.

A deed of gift of a slave in 1790, was void, unless possession accompanied and followed the deed.

DETINUE for negro Frederick. W. Wilson made a deed of trust of this negro to Mr. E. J. Lee, to secure Mr. Kennedy. And as part of the plaintiff's title, Mr. Lee read in evidence a deed from Mrs. Ramsay to W. Wilson, purporting to be in consideration of five shillings.

Mr. Youngs, for the defendant, offered to prove that the deed was a deed of gift, and that no money or valuable consideration was paid; and so nothing passed, as the deed was not proved and recorded according to Act of Assembly of 30th November, 1785, § 2, p. 16.

The COURT (*FITZHUGH, J., contra*) permitted the testimony to be given, reserving themselves to give an instruction to the jury thereupon, when the relevancy of the question to the case should be made to appear in the course of the trial:

When the Court instructed the jury that it was immaterial in this case whether the consideration was valuable or not, the defendant not being a creditor or subsequent purchaser.

Mr. C. Lee, for the plaintiff, contended that five years' possession of a slave by Wilson gave him a good title against all the world. So in ejectment twenty years possession is a good title. If the possession of the slave has been so long, that the remedy to recover him by law is gone, the title is good. Law of Virginia, 17th December, 1792, § 47, 48, 49.

Mr. C. Lee also contended, that the parol gift of the slave by

Oxley v. Willis.

Mrs. Gordon to the defendant in 1784, was void under the act of 1758, and to show that such a decision was had in the courts of Virginia, he cited the act of 1787, c. 22, the preamble of which recites such an adjudication; and he also contended that the act of 1787 was not retrospective, and cited *Turner v. Turner*, 1 Wash. 139.

Mr. Taylor, contra, contended, that the Act of Assembly, 1787, is retrospective; that after the passing of that act, the courts were bound to construe the act of 1758 so that a parol gift made in 1784 should be good, if possession accompanied the gift, unless the rights of creditors, or subsequent purchasers were affected.

But the COURT (DUCKETT, J., *contra*) decided, that a parol gift in 1784 was void under the statute of 1758, although possession accompanied and followed the gift, and that the act of 1784 was not retrospective.

The COURT decided (*nem. con.*) that a legacy of a slave gives no title, unless the executor had assented before action brought; that a deed of gift of a slave in 1790, was void between the parties under the act of 1758, and the act of 1787, unless possession accompanied and followed the deed; and five years' possession of the slave by W. Wilson, did not support the plaintiff's title, although the plaintiff is to be considered as a purchaser without notice and for a valuable consideration.

Motion for a new trial, by *Mr. Youngs*, for the defendant, on the ground of misconstruction by the Court, of the law of 1758, in having instructed the jury that a parol gift of a slave was absolutely void under that law, although possession accompanied the gift.

But the COURT, after the argument, (DUCKETT, J., absent,) refused a new trial, and said that although there might have been originally some doubt whether the act of 1787, was not intended to be retrospective, yet the case of *Turner v. Turner*, 1 Wash. 139, was conclusive.

Bills of exceptions were taken, but the judgment was affirmed by the Supreme Court of the United States, February, 1806. 4 Cranch, 401.

OXLEY, Assignee of T. Moore, a Bankrupt, v. WILLIS.

If one of two partners has authority, after the dissolution of the firm, to collect the debts, and he opens a new account with a debtor of the firm, charging him with the balance due to the firm, and giving him credits for payments, and goods, &c., received, and there is found a balance in his favor; this balance is due to the bankrupt, and not to the firm.

THE defendant was indebted to H. & T. Moore in a balance

of seventy-six dollars. When the partnership of H. & T. Moore was dissolved, T. Moore continued to carry on the business, and was authorized by his partner to collect and pay the partnership debts, as far as the joint effects should come into his hands. After the dissolution, T. Moore opened an account with the defendant in his own name, in which account he charged the defendant with the said balance of seventy-six dollars, and gave him credit for goods delivered after the dissolution, striking a balance upon the whole, in favor of T. Moore, of \$43 $\frac{11}{100}$. T. Moore, after the dissolution, and before the bankruptcy, advanced moneys on account of the partnership, to the amount of \$1378 $\frac{62}{100}$ more than there were partnership effects in his hands.

Verdict for the plaintiff, subject to the opinion of the Court on the above facts.

Judgment for the plaintiff, (*nem. con.*) on the ground that T. Moore had the power to settle the account, and had actually discharged the defendant from the demand of H. & T. Moore, by closing their account, and having actually set off the debts against each other before the bankruptcy. *Quære.*

L. & T. COOKE & SPELLMAN v. WOODROW.

If the subscribing witness has not been inquired for at the place to which he was last traced, evidence of his handwriting cannot be admitted to prove the instrument. General property in the goods, without actual possession, is sufficient to maintain trover.

An agreement to sell and transfer goods seized and held as a distress for rent due from the vendor, will transfer the general property so as to enable the vendee to maintain trover after the goods have been replevied.

TROVER.

Mr. Swann, for the plaintiff, offered a paper signed by J. Withers, not under seal, witnessed by one subscribing witness, purporting to be a mortgage of goods, and acknowledged in open court to be his act and deed.

Mr. E. J. Lee and *Mr. C. Simms*, *contrd.*

A mortgage of chattels must be under seal, and executed before three witnesses, and recorded according to the Act of Assembly of Virginia of 13th December, 1792, § 4, p. 157.

PER CURIAM. The paper is not evidence. The recording gives no authenticity to a paper, which the law does not require to be recorded, and nothing but a deed under seal is entitled to be recorded; here is no seal.

Mr. Swann then offered evidence of the handwriting of With-

ers to the deed, and of the handwriting of the subscribing witness, having first examined a witness, who testified that he knew the subscribing witness; that he understood he had a wife in Philadelphia; that the witness was in Alexandria two or three months, and when he went away said he was going to Philadelphia. The witness had written to him according to his directions at Philadelphia, but had received no answer, and had heard that the subscribing witness had gone to Norfolk and not to Philadelphia; but he had made no inquiries for him at Norfolk, and did not know where he was.

The COURT (*nem. con.*) said there was not sufficient evidence of due diligence on the part of the plaintiff to find the witness, and get his testimony.

Mr. C. Simms, for the defendant, contended that the sale, if any, was while the goods were in the custody of the law, under a distress for rent.

Mr. Swann, for the plaintiff. A general property, without actual possession, will support trover. 5 Bac. Ab. 258, 280; *Ward v. McCauley*, 4 T. R. 484.

Mr. Simms. But the plaintiffs have not proved a general property. A bargain while the goods were in custody of the law, under the distress, could give no property, because they were bound by the distress. 2 Bl. Com. 447.

The COURT (*nem. con.*) instructed the jury, that if they should be satisfied by the evidence, that Withers agreed to sell and transfer the goods in the declaration mentioned to the plaintiffs, upon consideration that the plaintiffs would, at his request, become security for him in a replevy-bond to replevy the said goods, which were then held by a distress for rent, and in further consideration, that they would place the overplus of such goods, after satisfying the replevy-bond, to the credit of the said Withers in their private account against him, and further, that the plaintiffs did become his security accordingly, and are ready to place the said overplus to his credit, as aforesaid, as soon as such overplus can be ascertained; — the plaintiffs, upon becoming security, as aforesaid, had such a general property in the said goods as will enable them to maintain this action of trover, although the plaintiffs never have had the actual possession in fact of the said goods.

The jury found a verdict for the defendant. The plaintiffs took a bill of exceptions, and a writ of error; but the judgment was affirmed by the Supreme Court of the United States. 5 Cranch, 13.

COOKE & COMPANY v. WEIGHTMAN.

If a promissory note, payable to A, or order, be indorsed in blank by B and by A, (B's name being written over that of A,) the plaintiff has not a right at the trial to fill the blanks by an indorsement from A to B and from B to the plaintiff, there being no evidence that such was the intention of the parties, but the note and blank indorsements. *Quære*.

ASSUMPSIT by the holder against the indorser of Pancost's note to Cohagan, or order, indorsed Richard Weightman, John Cohagan; in blank.

On the trial, the plaintiffs' counsel filled up the blank indorsements with an assignment from Cohagan, the payee, to Weightman, and from Weightman to the plaintiffs. The plaintiffs also offered in evidence, (to show the insolvency of Pancost,) the proceedings in a suit by the plaintiffs against him, admitted to be on the same note — the declaration in which proceedings stated it to be a note made by Pancost payable to Cohagan, and indorsed by Weightman to Cohagan, and by him to the plaintiffs.

Mr. Swann, for the defendant, prayed, and the COURT instructed the jury, that if they should be satisfied by the evidence that the note was indorsed by Cohagan to the plaintiffs, they could not recover against Weightman.

CRANCH, C. J., *contrà*, because there was no evidence before the jury upon which the prayer could be predicated; the declaration in suit against Pancost was admitted to be upon the same note; and the note, being produced, does not appear to have been assigned by Weightman to Cohagan, but by Cohagan to Weightman, and not by Cohagan to the plaintiffs, but by Weightman to the plaintiffs. The proceedings, therefore, contained no evidence to contradict that arising from the assignments written on the back of the note.

Mr. Taylor, for the plaintiffs, then prayed the Court to instruct the jury that if they should be satisfied, by the evidence, that the indorsements of Cohagan and Weightman were in blank, and intended by the parties to give the plaintiffs the security of both indorsers, and that it was delivered to the plaintiffs, for value received, so indorsed, the plaintiffs had a right to fill up the indorsements as they have; but he offered no other evidence of such intention than the said note and indorsements, the name of Cohagan being written on the back of the note below that of Weightman.

But the COURT (CRANCH, C. J., *contrà*) refused.
Verdict for the plaintiff.

Hays v. Bell & Wray.

MAYOR AND COMMONALTY OF ALEXANDRIA v. MOORE & Others.

Debt on an auctioneer's bond; plea, general performance. Replication, that the auctioneer did not pay over money to A and B. A rejoinder that it had not been established, by a judgment, that money was due to them by the auctioneer, is an issuable plea, to set aside an office judgment.

DEBT on an auctioneer's bond; plea, general performance; special replication, that Moore, the auctioneer, had not paid money to Archer and to Vowell, which he had received as auctioneer.

At the first term after office-judgment, and to set it aside, *Mr. C. Simms*, for the defendant, Patten, (one of the sureties,) offered a rejoinder that Archer and Vowell respectively had not proved, by a suit and judgment, that the money was due from Moore to them.

Mr. E. J. Lee, for the plaintiff, objected that it is not pleading to issue within the meaning of the Act of Virginia, 12th December, 1792, § 28, p. 78, and that it will drive him to a special demurrer.

But the COURT (*nem. con.*) admitted the replication, because it was an issuable plea, and if bad it is bad on general demurrer.

FAW v. DAVY.

Parol evidence may be given to explain the expression "certain controversies and accounts" in a written submission.

An award made upon part only of the subjects submitted, will be set aside.

THE COURT heretofore had admitted parol evidence in this cause to explain the expression "certain controversies and accounts," in the written submission, and now being satisfied, by the evidence, that certain flour accounts were intended to have been submitted, and that the arbitrators had not considered those accounts, but made an award upon only part of the subjects submitted, set aside the award and ordered an account to be taken by a master; the cause having been set for hearing by consent.

HAYS v. BELL & WRAY.

In Alexandria, in an action of debt against the maker of a promissory note for two hundred and fourteen dollars, reduced by payments indorsed on the note before suit brought, to eight dollars and ninety-four cents, a verdict for the debt in the declaration mentioned to be released on the payment of eight dollars and ninety-four cents, will sustain a judgment for the plaintiff in the Circuit Court.

DEBT on a promissory note for 214 dollars. Payments in-

dorsed on the note, before the suit was brought, reduced the sum due on the note to eight dollars and ninety-four cents. The verdict was for the debt in the declaration, to be discharged on the payment of eight dollars and ninety-four cents.

Mr. E. J. Lee, for the defendant, contended that a nonsuit ought to be entered, under the Act of Virginia, 3d December, 1792, § 38, p. 90.

Mr. Swann, for the plaintiff, contended that this cause could not have been heard on a petition in Virginia. If an account in England be reduced by offsets to less than forty shillings, it is no cause of nonsuit. *Pitts v. Carpenter*, 1 Wils. 19. The declaration must state the whole amount of the note. The debt in law continues until the whole sum is paid. It is one entire debt. An action of debt must be brought on a promissory note under the Act of Assembly.

If this action had been brought before a justice of the peace, upon the face of the declaration, the defendant might defeat the plaintiff. The justice of the peace would have to decide upon the whole validity of the plaintiff's claim. The Act of Congress of 27th February, 1801, [2 Stat. at Large, 103,] only intended to give them the power of deciding upon contracts to the amount of 20 dollars.

This Court decided the point in the case of *McKnight v. Ramsay*, at Alexandria, October, 1801, [*ante*, 40] and refused a nonsuit. *Mr. Swann* cited 1 Wilson, 19.

The COURT (DUCKETT, J., *contrà*) ordered judgment to be entered for the plaintiff on the verdict. See the case of *McKnight v. Ramsay*, [*ante*, 40] and *Currey v. Fletcher*, [*ante*, 113] Stat. 3 Jac. c. 13; 23 Geo. 2, c. 33, § 19; Doug. 245, 448; 1 Wils. 19; Maryland law 1785, c. 46, § 7; 1791, c. 68, § 9, 10; 1796, c. 43, § 5.

FAXON & COMPANY v. DYSON'S ADMINISTRATORS.

A promise by an administrator to pay in consideration of assets, will support a judgment *de bonis testatoris*.

THE declaration stated that, in consideration of assets, the defendants promised to pay as administrators, &c. General demurrer.

Mr. Youngs, for the defendant, contended that the undertaking was personal, and ought not to be charged as made by them as administrators. The judgment will not bind the estate of the intestate. The judgment in this case must be of the defendant's

Maynadier v. Wroe.

own goods. No admission or promise of an administrator can bind the estate, so that judgment can go against the goods of the intestate.

Mr. E. J. Lee, for the plaintiffs, cited *Atkins v. Hill*, Cowper, 284, and *Hawkins v. Saunders*, 1 H. Bl. 102, 103, 112.

Demurrer overruled. Judgment for the plaintiffs, *de bonis testatoris*.

DEAKINS v. LEE, Special Bail for McCarty Fitzhugh.

The Court will permit the defendant to withdraw the general issue and file a general demurrer.

Mr. E. J. Lee prayed leave to withdraw the plea of *nul tiel record*, and to demur generally. Granted, and judgment on the demurrer in favor of the plaintiff.

WHITE v. SWIFT.

In an action against a surety in a bond to perform a decree, it is not necessary that notice of the decree should have been given to the principal.

DEBT on a bond conditioned that one Henfry should perform the decree of the Court in a chancery attachment, and pay the amount of such decree.

Judgment for the plaintiff on demurrer.

The question was, whether notice of the decree ought to be given to the principal, before you can sue the bond against the surety.

MAYNADIER v. WROE, Special Bail of Bickenton.

Upon surrender of the principal to the sheriff by the bail under the law of Virginia, notice must be given immediately to the creditor, his attorney, or agent. The knowledge of the plaintiff's attorney is not sufficient.

THE question was, whether the surrender of bail to the sheriff, with the knowledge of the plaintiff's attorney, without regular notice, according to the 31st section of the Act of Virginia of the 12th of December, 1792, is a discharge of the bail.

The COURT was of opinion that the notice must come from the bail, and be given immediately to the creditor, his attorney, or agent.

Negro Jenny v. Crase.

GRUNDY v. YOUNG.

Error. *Supersedeas*. Injunction.

MOTION for judgment on a forthcoming bond given on the original judgment, which had been enjoined. The injunction was dissolved on the 29th of April, 1807. The writ of error was taken out on the 14th of May, 1807. The Court rose on the 30th of April, 1807.

Judgment on the bond and execution awarded; the writ of error to the decree of dissolution being no *supersedeas* to the original judgment at law.

NEGRO JENNY v. GEORGE CRASE.

An injunction to prevent a person from taking away a colored woman, who has sued for her freedom in this Court, will not be granted upon a mere statement of the plaintiff's apprehension.

BILL for injunction to prevent the defendant from taking away the plaintiff out of this county, until he appears and answers a suit at law to try the right of freedom. Injunction refused. Defendant not a resident of the county of Alexandria, nor of the District of Columbia.

The plaintiff merely states her apprehension.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1807, AT ALEXANDRIA.

UNITED STATES *v.* ELIZABETH McLAUGHLIN.

In manslaughter, a peremptory challenge is allowed under the Virginia law. Upon an indictment at common law for manslaughter, the Court will give judgment of fine and imprisonment under the Act of Congress of April 30, 1790, § 7.

INDICTMENT against the defendant at common law for manslaughter, in killing her daughter.

The prisoner was allowed a peremptory challenge, on the authority of the case of *United States v. Browning*, July term, 1806, [*ante*, 330.]

Verdict, guilty.

The sentence was imprisonment for twelve calendar months from, and including the third day of November last, (the day of her commitment,) and one dollar fine.

This sentence was imposed under the Act of Congress of 30th of April, [1 Stat. at Large, 113.]

UNITED STATES *v.* THOMAS KING, a Negro Slave.

No road in Virginia is a highway within the statute which takes away the benefit of clergy in certain cases, unless it be a public road laid out according to law — no evidence of which can be received but the record.

Upon an indictment at common law, the Court may pass sentence under a statute.

INDICTMENT for highway robbery of John Graham, and taking from him his watch.

Upon the trial, *Mr. Simms*, and *Mr. Swann*, for the prisoner, called for evidence of the place being a highway.

Mr. Jones, for the United States, offered to prove by parol evidence, that it has been long used as such, and to prove by the records of this Court, that this Court has appointed an overseer of the road. If there is a record of the opening of the road, it must be in Fairfax county, in Virginia, out of our jurisdiction. If there should be a fault in the laying out of the road, if the viewers or

Ex parte Abraham Lindo.

petitioners did not proceed exactly according to law, yet it would be a highway. Highway means only common way, — *communis strata*; a river is a highway. If an individual lays out a road through his own land, from town to town, as a highway, it is a highway. 1 Hawk. c. 76, § 1.

Mr. Swann and *Mr. Simms*, in reply. By the Act of Virginia of November 27, 1789, § 1, p. 46, the benefit of clergy is taken away from robbery in or near about a highway. It must mean something more than a common way. It must mean a road on which a man has a right to travel, and the obstruction of which may be prosecuted as a nuisance. It cannot be a road opened only by private agreement. In 1 Hawk. 367, § 3, it is said that an old way cannot be altered nor a new way laid out without the king's license, nor are the inhabitants obliged to keep watch in the new way, nor to make amends for a robbery therein committed. All public roads must appear on record; no road is a highway but a public road laid out by authority of the County Court. The indictment charges the robbery to be in the highway. That cannot be a highway which any individual can lawfully shut up.

THE COURT (DUCKETT, J., *absent*,) decided that no road in Virginia can be said to be a highway within the meaning of the act, unless it be a public road laid out according to law, and that no evidence but the record can be allowed to prove it to be such a public highway.

Verdict, guilty of the robbery, but not in a highway.

THE COURT sentenced him to be burnt in the hand and whipped with one hundred stripes. This sentence was passed under the Virginia Act of Assembly of 17th December, 1792, p. 190, § 34.

Ex parte ABRAHAM LINDO.

A witness must answer whether he saw the defendant at a public gaming-table, inasmuch as the answer cannot criminate or tend to criminate the witness himself.

RULE to show cause why an attachment of contempt should not issue against a witness for not answering this question by the grand jury, "Did you within the last three months see Richard Lewis play at any public gaming-table within the county of Alexandria?"

The witness objects that it may tend to criminate himself, by showing that he was present at a public gaming-table, and may induce Lewis to prosecute him; and *Mr. Swann*, for the witness, cited 1 Morgan's Essays, 438; 2 Hawk. c. 46, § 20, p. 609; 1 Atk. 539.

 United States v. Hunter.

But the COURT (DUCKETT, J., absent,) decided that he must answer, inasmuch as the answer could not criminate nor tend to criminate himself. Whereupon he submitted to answer.

 BENNETT v. WILSON.

The Court will not continue a suit at law, at the motion of the defendant, on the ground that the plaintiff had not answered a bill of discovery, he being absent, and the bill seeking relief as well as discovery.

The defendant's book of accounts in his own handwriting is not evidence for him, although it contains the first entry.

Mr. C. Lee, for the defendant, moved for a continuance of the suit at law, on the ground of a bill for a discovery not answered, and now ready to be taken for confessed, the defendant, Bennett, being absent, and the usual notice having been given by publication; and of the death of Thompson, the most material witness. If a bill for a discovery be taken for confessed, the suit at law will be perpetually enjoined. 2 Har. Ch. Pr. 231, 233.

Mr. Swann, *contrà*. The English practice applies only to cases where the party is in contempt.

The COURT (DUCKETT, J., absent,) refused to continue the cause on the ground that Bennett had not appeared to the bill for discovery; because it also sought general relief, and prayed an injunction, stating all the grounds of defence to the suit at law, and drew the whole subject-matter into equity. There was no affidavit stating that other testimony could not be had in lieu of Thompson's; and Wilson may obtain an injunction upon giving security. The plaintiff at law ought to have a judgment for his security.

Mr. C. Lee, for the defendant, on the trial offered the defendant's book of accounts in the defendant's own handwriting, and said it was the original entry of the transaction and settlement of the account upon which the promissory note was given.

But the COURT (DUCKETT, J., absent,) refused to permit it to be read in evidence.

 UNITED STATES v. JOHN HUNTER. SAME v. COLIN HUNTER.
 SAME v. JOSEPH H. HUNTER. SAME v. R. H. DAVIDSON.

If several persons, jointly concerned in an assault and battery, be separately indicted, each as for his own offence, and all tried at the same time by the same jury, one of the defendants may be examined as a witness for the others.

In order to make those liable who were only present aiding and abetting, it is not necessary that they should be indicted jointly, nor with a *simul cum*.

ASSAULT AND BATTERY. These were separate indictments, and

Hodgson v. Butts.

not charged *simul cum*, &c., but were agreed to be tried at the same time by the same jury.

Mr. Taylor, for the defendants, offered John Hunter as a witness for the other defendants.

Mr. Jones, Attorney for the United States, objected, unless the jury should first decide on John Hunter's case, saying that the assault of one is the assault of all present aiding and abetting, and the evidence is that one made the assault and the others were present aiding and abetting.

But the COURT (DUCKETT, J., absent,) said the witness might be sworn in all the cases but his own, inasmuch as they were not jointly indicted, nor charged *simul cum*, &c., and the swearing the same jury in the four cases, is but as charging four separate juries.

Mr. Jones then moved to discharge the jury from the consideration of John Hunter's case.

But the COURT refused.

Mr. Taylor then prayed the Court to instruct the jury that none of the defendants can be found guilty unless for his own assault and battery, and that the others cannot be found guilty as aiding and abetting John Hunter. That they ought to have been indicted *simul cum*, or else jointly.

But the COURT refused, because all present aiding and abetting are principals.

UNITED STATES v. MILLY RHODES, a Slave.

The owner of goods stolen by a slave is not a competent witness for the prosecution, because he is entitled to one half of the fine which the Court must impose under the Act of Congress.

INDICTMENT for stealing a piece of Russia linen, the property of Mr. Vowell.

Mr. Jones contends that Vowell is a competent witness, because as a slave can have no property, there ought not to be a fine, and if no fine, no interest.

But the COURT said, the Act of Congress under which she is indicted makes the fine a necessary part of the punishment, and Mr. Vowell will be entitled to one half of the fine.

DUCKETT, J., absent.

HODGSON v. BUTTS.

The Court will grant a rule on a witness residing in Baltimore, to show cause why he should not be attached for not attending according to summons.

THE deposition of James Hamilton had been taken *de bene esse*,

by the defendant with notice, and the plaintiff's attorney appeared under protest, that is, reserving all objections, &c., and cross-examined the witness; the defendant had a subpoena served on Hamilton, who resides in Baltimore, and who by letter acknowledged service, but stated that he was a clerk in the collector's office and could not attend without detriment to the public.

The defendant's counsel, *Mr. Jones*, prayed for a continuance unless the plaintiff would permit the deposition to be read in evidence.

The COURT (DUCKETT, J., absent,) continued the cause and directed a rule on the witness to show cause on Saturday, the 12th instant, why an attachment of contempt should not issue against him for not obeying the summons.

CREASE v. PARKER.

The plaintiff will not be permitted to read to the jury his own statement of his account current, as a statement of the particular items of his claim. Nor will the Court permit the jury to take minutes of the items of which no evidence is offered. The promise of a slave does not bind him when free, although it be to pay for money borrowed, by which he obtained his freedom.

ASSUMPSIT against a negro for the money lent and advanced by the plaintiff to the defendant to enable him to purchase his freedom, the defendant having thereby obtained a deed of emancipation.

Mr. Swann, for the defendant, prayed the Court to instruct the jury, in effect, that the defendant, being a slave when the money was advanced, is not answerable in this action unless the defendant has since promised upon that consideration, and that those facts may be given in evidence and avail the defendant upon the plea of *non assumpsit*.

Mr. Youngs, for the plaintiff, offered to read, as a memorandum of the particular items of the plaintiff's claim, a written statement of his account of debits and credits; which the COURT refused. He then prayed that the jury might be permitted to take minutes of those items of which the plaintiff produced no evidence; which the COURT also refused, but permitted them to take a minute of the amount of the balance which the plaintiff claimed.

Mr. Swann and *Mr. Herbert*, for the defendant, contended that a slave cannot contract an obligation, nor make a valid promise, and that the advance of the money to him while a slave cannot create an obligation in law. A subsequent acknowledgment cannot revive what never before existed. If there were an express pro-

mise it would be a new and independent cause of action which must be declared upon. A promise made since the suit brought, cannot support this action.

The Act of Virginia, of December 17th, 1792, c. 103, section 36, p. 191, expressly discharges every emancipated slave from the performance of any contract entered into during servitude. A void promise cannot support a subsequent promise, for it is no consideration; but, if voidable only, it may. An infant may make a voidable promise, and subsequent assent will make it good; but if the infant executes a bond, it is a void act, and no subsequent promise, at full age, to pay it, will bind the infant. A promise by a slave is absolutely void. If the slave gains money or property it belongs to his master.

Mr. Youngs, contrà. There is no law which deprives the slave of the power of contracting. If there were no law to prevent a *feme covert* or an infant, they could contract. All persons may, *primâ facie*, contract. The defendant must show the law which prevents a slave from contracting. The consideration of freedom is as valuable as that of necessities for an infant. Villains in England were capable of contracting with everybody except their master; they could also transfer property; they might be sued, and their property unless seized by the lord, was liable to be taken in execution. Before the Act of Assembly, slaves were considered as real estate and descended with the land, like the villains in England. If a slave purchases and sells property, the master cannot claim it in the hands of the third person, although he might have seized it while in the hands of the slave. A slave may be sued, although not held to bail.

This Court, under the Act of Congress, gives a slave the same mode of trial for crimes as a free man, and this Court said, a few days ago, (in *Milly Rhodes's case*,) that they could impose a fine upon a slave; although a slave cannot be taken on a *capias ad satisfaciendum*, his goods may be taken on a *feri facias*, goods which the slave has a right to hold until the master has seized them to his own use. In England you could not serve a *ca. sa.* on a villain, but you might a *fi. fa.* on his goods.

The Act of Virginia applies only to contracts made with the former master or mistress. But if the slave could contract with a third person, the legislature did not mean to put it in the power of the master to release the slave from any such contract with a third person. The consideration was good in conscience and morality, and will support a promise or acknowledgment made after he became free.

The COURT (CRANCH, C. J., *contrà*,) instructed the jury, as stated in the bill of exceptions; the substance of which is that if they

should be of opinion, from the evidence, that the claim of the plaintiff (if he has any) arose in consequence of money advanced by the plaintiff to the defendant, (who was then a slave) to purchase his freedom, and that he was afterwards manumitted by his master before the institution of this suit, and that the defendant, after the institution of this suit, acknowledged the debt in the presence of Harris, a witness, the plaintiff could not support the present action.

CRANCH, C. J., dissented, because he was of opinion that the defendant might make a valid promise, (subsequent to his emancipation) grounded upon the consideration of the money advanced while the defendant was a slave, and still this claim would be in consequence of such advance of the money, and that such promise would become a new contract made subsequent to his manumission, and therefore not within the Act of Assembly. He also inclined to the opinion that the acknowledgment to Harris was a fact from which the jury might infer an express promise by the defendant subsequent to his emancipation, and before the suit brought. See *Williams v. Brown*, 3 B. & P. 72, Heath, J's., opinion.

BARTLEMAN v. DOUGLASS.

An agreement by the plaintiff to release the defendant upon his executing a deed, is a good defence in *assumpsit*, the deed being executed.

A promise by the defendant to pay the plaintiff an additional sum is a fraud upon the other creditors, and is void.

ASSUMPSIT. *Non assumpsit* and issue.

Mr. E. J. Lee, for the defendant, gave in evidence an agreement of the plaintiff and other of his creditors, to release him on executing a deed of his property to such trustees as the subscribers should appoint, and that he executed such a deed.

Mr. Swann, for the plaintiff, contended. 1. That the plaintiff never approved the trustees, or the deed. 2. That no release was ever executed by the plaintiff. 3. That the defendant promised to secure the plaintiff in another debt due from the defendant and another.

Mr. E. J. Lee, in reply, cited *Cockshot v. Bennett*, 2 T. R. 763, and *Butler v. Rhodes*, Peak's N. P. 238.

The COURT (FITZHUGH, J., *contra*,) refused to instruct the jury that the agreement and deed did not make a good defence at law; being of opinion that the agreement bound the plaintiff to give a release upon the execution of the deed, and a court of equity would have compelled him to execute it; and that in *assumpsit* it

ought to be admitted in evidence on the general issue, it being a fraud upon the defendant as well as upon the other creditors that the plaintiff should refuse to execute the deed after the others had executed it. See *Heathcote v. Crookshanks*, 2 T. R. 24; *Jackson v. Duchaire*, 3 T. R. 551; and *Jackson v. Lomas*, 4 T. R. 166.

WHEATON v. LOVE.

The Court will not, on motion of the defendant, continue a cause because the costs of *non pros.* have not been paid.

The party will not be permitted to give parol evidence of a cause of caption of a deposition, different from the cause stated by the magistrate who took the deposition; and if that cause be insufficient the deposition will be rejected.

THE Court refused to put off the trial of this cause on account of the non-payment of the former costs; the cause having been reinstated on payment of costs. [*ante*, 429.]

Mr. E. J. Lee, for the defendant, objected to the deposition of J. McCanahan, taken under the Act of Congress. 1. The certificate does not state it to be a civil cause, but only in a suit. 2. It does not appear by the certificate that the witness lived more than one hundred miles from the place of trial; it only states that the deposition was taken at his office in the borough of Norfolk, which is more than one hundred miles from the place of residence of the defendant. It does not appear that the plaintiff's agent or attorney does not live within one hundred miles of the place of caption.

Mr. Swann, contra, contended that the omission of the magistrate to certify may be supplied by parol proof, and offered to prove that the witness lived more than one hundred miles from the place of trial, and that that was the cause of caption, although the magistrate had certified a different cause. The certificate of the judge is not conclusive. If the judge had delivered it into court, no certificate would have been necessary.

Mr. Jones, in reply. The party who introduces the deposition cannot give evidence to disprove what the judge certified. The certificate of the judge is made evidence by the Judiciary Act of 1789, § 30, [1 Stat. at Large, 73,] of the reason of taking the deposition, and of the notice.

The COURT (*nem. con.*) refused to receive the deposition, because the mayor of Norfolk, before whom it was taken, had not certified such a cause of caption as the law requires. The plaintiff became nonsuit; and upon his motion the cause was ordered to be reinstated on the 15th, if the whole costs should be paid before that time.

 Wilson v. Mandeville & Jamesson.

JAMES YOUNG v. MARINE INSURANCE COMPANY OF ALEXANDRIA.

In an action against an insurance company, a nephew of a stockholder is not a competent juror.

It is not a principal cause of challenge, that the juror has had conversations with some of the parties; but it is evidence for the consideration of triors upon a challenge for favor.

Mr. James R. Riddle, being called as a juror, was objected to by the plaintiff, because he was the nephew of a stockholder in the insurance company.

The fact being agreed, the COURT decided it was a good principal cause of challenge.

Mr. Swann, for the plaintiff, cited *William v. Delafield*, 2 N. Y. T. R. 329; *Livingston v. Delafield*, 3 N. Y. T. R. 49. It was then suggested by the plaintiff's counsel that perhaps some of the persons called as jurors had had conversations with some of the parties, and hoped that such persons might be excused, or rather struck off the panels.

But the COURT told the counsel they might challenge for favor and have it tried by triors.

Mr. Swann, for the plaintiff.

Mr. C. Lee, for the defendant.

WILSON v. MANDEVILLE & JAMESSON.

The Statute of Limitations does not apply to accounts current of trade and merchandise between merchants, and it is not material that all dealings between the parties had ceased for more than five years before the bringing of the suit.

After judgment for the plaintiff upon demurrer to the replication to the plea of limitations, the Court will not permit the defendant to withdraw the demurrer, and rejoin specially, unless he can show by affidavit, that it is necessary to the justice of the case.

ASSUMPSIT. The declaration consisted of three counts. 1. *Indebitatus assumpsit* for goods sold and delivered. 2. *Quantum valebant*. 3. *Indebitatus assumpsit* in the sum of \$135.47, "for the hire of a certain negro man named Herbert, by the plaintiff, before that time hired to the defendants at their special instance and request, and they the said defendants according to that hiring, had used and labored the said negro man; and being so indebted the said defendants in consideration thereof," &c., "promised to pay," &c.

Pleas. 1. *Non assumpsit*. 2. The Act of Limitations, *non assumpsit infra quinque annos*.

Replication. "That the money in the several promises and

undertakings aforesaid above mentioned in the declaration, at the time of making the promises and undertakings aforesaid, became due and payable on an account current of trade and merchandise had between the said plaintiff and the said defendants as merchants, and wholly concerned the trade of merchandise."

Rejoinder. "That in the month of January, 1799, the partnership of Mandeville and Jamesson was dissolved, and public notice given of such dissolution, of which the plaintiff had a knowledge at the time; and that at the time of the said dissolution of the partnership aforesaid, all accounts between the said plaintiff and the said Mandeville and Jamesson ceased, and since which time no accounts have existed, or been continued between the said plaintiff and the said defendants, and this they are ready to verify," &c.

Surrejoinder. "That the goods, wares, and merchandise in the said declaration mentioned, were by the said plaintiff sold and delivered to the said defendants, and the said negro in the said declaration mentioned was hired by the said plaintiff to the said defendants, before the 9th day of January, in the year 1799, the time when the said defendants in their said rejoinder state their said copartnership was dissolved, and this," &c.

Demurrer. "Because the surrejoinder is a departure in this, that it is no answer to the defendant's rejoinder."

Mr. E. J. Lee, for the plaintiff, cited *Scudamore v. White*, 1 Vern. 456; *Chievly v. Bond*, 4 Mod. 105; *Catling v. Skoulding*, 6 T. R. 189.

Mr. Youngs, for the defendant, cited *Webber v. Tivill*, 2 Williams's Saunders, 124; *Welford v. Liddel*, 2 Ves. 400.

CRANCH, C. J., delivered the opinion of the Court, December 18, 1807.

Upon this demurrer the first question is whether the replication is substantially good. If it be consistent with the declaration and goes to fortify it, and to avoid the effect of the defendants' plea in bar, it is good; but if it be inconsistent with the declaration, or be no answer to the defendants' plea, it is bad, and judgment must be against the plaintiff. The declaration charges that the defendants are indebted to the plaintiff in a certain sum, for the time of a negro. The replication avers that the money became due and payable on an account current of trade and merchandise had between the plaintiff and defendants as merchants, and wholly concerned the trade of merchandise. The question then occurs, whether money due for the hire of a negro, can become due and payable on an account current of trade and merchandise between merchants, and whether such account can be said wholly to concern the trade of merchandise. There can

be no doubt that money due for the hire of a servant may be a proper charge in an account current between merchants; the servant may even be employed as a porter in a merchant's warehouse; or he may be employed in other confidential business concerning the trade of merchandise, so that such an account may, strictly and literally, "wholly concern the trade of merchandise." If the defendants had taken issue upon the facts averred in the replication, and the plaintiff should have produced in evidence an account current, rendered to him by the defendants, giving credit to the plaintiff for the hire of the negro, I imagine it would have been good evidence to show that the money for the negro hire was due on an account current of trade and merchandise. In order to recover by law the amount of an account current, it is often necessary, according to the forms of legal proceedings, to divide it into distinct parts, classing charges of the same kind together, and framing a particular count in the declaration for each class. It may happen that only one item of the account may apply to one count of the declaration; and that item alone would not constitute an account current; yet it is evident that the money due for that item may be due upon an account current, and such may be the present case. The replication therefore is not inconsistent with the declaration.

The next question is whether the defendants' rejoinder is good.

The facts stated in this plea are, that in January, 1799, all accounts between the plaintiff and the defendants ceased: and that since that time, no accounts have existed, or been continued, between the plaintiff and the defendants. It is evident that this rejoinder is no answer to the replication, unless by implication, (derived from the negative pregnant, "no accounts have existed between the plaintiff and defendants since January, 1799,") that the accounts had been settled and stated and the balance paid. Because if such settlement had not taken place, the account must have continued to exist notwithstanding the dissolution of the copartnership, and although no further dealings were had afterwards between them. But if the meaning of the rejoinder be, as it seemed to be understood by the defendants' counsel, that all dealings ceased at that time between the plaintiff and defendants, and that no new mercantile transactions had since taken place between them, the question will occur whether, a cessation of dealings for five years before the bringing of the action, takes away from the plaintiff the benefit of the exception in the statute, in favor of merchants' accounts. No case has been cited which sanctions such a doctrine.

The result of the cases collected in the notes to the case of *Webber v. Tivill*, is that where there are mutual accounts, and

some of the items credited are within the six years, the plaintiff need not rely on the exception in favor of merchants' accounts, but may rely upon those items as evidence of an acknowledgment of there being an unsettled account and a promise to pay the balance. But when no items are within the six years, then it behooves the plaintiff to rely on the exception in favor of merchants, and to plead it; and then it is immaterial whether any part of the dealings were within the six years or not, for the case is wholly out of the statute. These principles are acknowledged by Lord Kenyon, in the case of *Catling v. Skoulding*, 6 T. R. 189, and are in substance stated by Sergeant Williams, in his notes to the case of *Webber v. Tivill*. If this rejoinder is to be considered as an implied averment that the accounts were settled and discharged, it is bad, because it is not a direct averment, but is a negative pregnant, and because it amounts to the general issue. So that whatever may be the meaning of the rejoinder, it is bad.

This being the opinion of the Court, it is unnecessary to inquire whether the surrejoinder be good or bad. The judgment must be for the plaintiff on the demurrer.

Opinion given *nem. con.*

Mr. Youngs, after the decision upon the demurrer, moved the Court for leave to withdraw the demurrer and take issue on the plaintiff's replication to the plea of the Statute of Limitations.

But the COURT refused, unless the defendant could show, by affidavit, that the plea of the statute was necessary to the justice of the case; namely, that his evidence was lost, &c.

(Judgment affirmed in Supreme Court of the United States. 5 Cranch, 15.)

JONES, Attorney United States, v. WOODROW & NEAL, Constables.

It is not necessary, upon a rule on a constable to show cause why he should not be removed "for extortion under color of his office," that there should be any specification of the particular facts relied upon.

RULE upon the defendants to show cause, why they should not be removed from office "for extortion under color of their office." This rule was laid last Saturday, (CRANCH, C. J., absent.) Woodrow & Neal brought a large subscription of certificates of character, which they showed as cause.

Mr. Jones, for the United States, called witnesses.

Mr. Youngs and *Mr. F. Lee* contended that there ought to be a specification of charges, and objected to evidence under such a general charge.

Mr. Jones was permitted to proceed.

CRANCH, C. J., *contra*, because the charge was too general.

Ex parte JOHN A. BURFORD.

Upon an attachment from the Orphans' Court for contempt in not appearing to answer, &c., the marshal cannot justify the imprisonment of the party after the return day of the attachment, unless by an order of commitment by that court.

A person surrendered by his bail, and prayed in custody, but not charged in execution, may be discharged upon *habeas corpus*.

Habeas corpus ad subjiciendum. The marshal returned that he held him under an attachment of contempt from the Orphans' Court, dated January 9, 1797, returnable on the 13th of the same month, for not appearing on the 8th, to show cause why he should not give counter security to his sureties in the administration of Dyson's estate. Upon which attachment the marshal had returned "executed and in custody," but no order of the Orphans' Court was made for the commitment, nor did it appear that the Orphans' Court had made any further order respecting the business. The return further stated that he had been delivered up by his bail in a suit at law, and prayed in custody; but the twenty days having expired and the defendant not charged in execution, —

The COURT (*nem. con.*) were of opinion, that the attachment only authorized the marshal to hold him till he could bring him before the Court on the 13th of January, and discharged the prisoner. See Virginia Law, 12th December, 1792, § 31.

 UNITED STATES v. ABRAHAM FAW.

Neither at common law, nor by the Statute of Virginia, is the coroner bound to put in writing the effect of the evidence given upon an inquisition, unless the offence be found to be murder or manslaughter.

THE indictment charged, that the defendant, being coroner of the county of Alexandria, and having, upon view of the dead body of one Curran, taken an inquest, stating that, while opposing the lawful orders of a justice of the peace, the said Curran was killed by a brickbat thrown by some unknown person, but not finding the killing to be murder nor manslaughter, he, the defendant, "wilfully, injuriously, and unlawfully made a false statement of the evidence in writing, and suppressed material parts of the same; and annexed to the inquisition a false, colorable, and unfair statement, in writing, of the said evidence, under the false and colorable pretence of putting in writing and annexing to the said inquisition fairly and truly the effect of the said

Cannon v. Davis.

evidence, being material, in contempt of the laws of the United States, in violation of the duties and dignity of his office, and against the peace and government of the United States."

Mr. E. J. Lee, and *Mr. F. L. Lee*, for the defendant, moved the Court to quash the indictment. The coroner is not bound at common law to put down the effect of the evidence, in writing, in any case; and by the law of Virginia, p. 125, § 11, (29th November, 1792,) he is required to do it only in case the inquisition shall charge some person with murder or manslaughter, which this inquisition does not. 1 Bl. Com. 346; 2 Inst. 31; 4 Ib. 271. This is an indictment at common law, and if he was not bound at common law to state the evidence in writing, it is no offence to state it imperfectly or incorrectly. And if it states no offence at common law, it may and ought to be quashed on motion. *Rex v. Page*, 1 Lev. 304; *Rex v. Sellars*, 3 Mod. 167; *Rex v. Griffith*, 3 Ib. 201; *Rex v. Whitehead*, Salk. 371; *Rex v. Hotch*, Str. 552; *Rex v. Lister*, 2 Str. 788.

Mr. Jones, for the United States, *contra*. The coroner, at common law, has a right to take evidence in writing, and if he undertakes to do it, and does it unfaithfully, wilfully, and falsely, it is an offence at common law. The depositions may be used for various purposes, as in a question of bail, or to justify an arrest of some person, or to discredit a witness upon the trial.

The COURT, at July term, 1808, quashed the indictment, being of opinion that it did not set forth an offence at common law, or under the statute; inasmuch as by the common law, the coroner was not bound to put down in writing the evidence, or the effect of it, and the statute required it to be done only when, by the inquisition, some person is indicted for murder or manslaughter.

MARGARET M. CANNON v. THOMAS DAVIS.

This Court has jurisdiction to discharge an apprentice upon petition, on account of cruelty of the master, and to bind out the petitioner to another master.

On the petition of Margaret Matilda Cannon, an apprentice, to be discharged from her indentures on account of cruelty of her master.

The COURT, after some argument, decided (*nem. con.*) that they had jurisdiction in this case, and being satisfied of the cruelty of her master, Thomas Davis, ordered the apprentice to be removed, the indentures to be cancelled, and the child to be bound out to George Drinker. See the Act of Virginia, 11th December, 1792, c. 95, § 15, p. 174.

BANK OF ALEXANDRIA v. YOUNG. SAME v. YEATON.

The Court will not order a number of actions of debt upon several promissory notes due at several times, to be consolidated, although the parties are the same in all, and each note was payable before any one of the suits was brought.

In an action by the Bank of Alexandria, upon a note made negotiable in that bank, the Court will rule the defendant to trial at the first term, if the writ be served ten days before the return day.

Virginia had a right to legislate over this part of the district, until the 27th of February, 1801.

The charter of the Bank of Alexandria is a public act.

Mr. Youngs, for the defendant, moved the Court to consolidate a number of actions of debt upon promissory notes, all the notes being due at the time of issuing the writs. *Cecil v. Briggess*, 2 T. R. 639. One action of debt, he said, might have included the whole; it is but one debt. The plaintiffs were not obliged to bring debt, they might have brought assumpsit for money had and received, and given the notes in evidence.

Mr. C. Simms, contrà. This is a novel motion; there is no precedent for it in this district, or in Virginia. The English practice is founded upon a rule of their courts. Until this court has made a general rule on the subject, they will not depart from the former practice. The case cited was assumpsit; this is debt. That might have been on two items of one account. The declaration must have as many counts as notes. If the plaintiff should fail of supporting one note, he might fail for the whole, for he could not recover part of the debt. It is no oppression. The defendant ought to have paid the notes as they became due. How can they be consolidated? The defendant has given separate bail in each suit. There must be a new declaration which must conform to the writ, but to which writ? The Court will not order these writs to be dismissed, and thereby discharge the bail; where successive actions are brought, the English courts will not consolidate them. *Tidd*, 556, c. 25. The notes here became due at different times.

The COURT refused to order these twenty-eight actions to be consolidated, because they were brought under the old practice, and no general rule had been made by the court on that subject. The Court said they would take into consideration the propriety of making such a general rule.

This was an action of debt against the maker of a promissory note, with an express consent in writing, that it should be negotiable in the Bank of Alexandria, according to the 20th section of the charter of the 23d of November, 1792, and the *capias ad respondendum* was served more than ten days before the return day

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of the writ; in which case, it is provided by that section, that "the court shall cause an issue to be made up in such suit, and a trial shall be peremptorily had at the first court to which such writ shall be returnable, and judgment rendered accordingly."

Mr. Simms, for the plaintiffs, moved for a rule on the defendant to plead on the next day.

Mr. Youngs, for the defendant, objected — 1. That the charter of the bank is a private act, and the printed book of the laws is no evidence of it. 2. That the charter of the bank expired on the first of January, 1803, by its own limitation in the Act of 23d of November, 1792, unless extended by the Act of Virginia of the 21st of January, 1801, which authorized the stockholders of the bank to hold their elections, and remove and conduct their business out of the District of Columbia, within the county of Fairfax, in Virginia, and extended the charter to the 4th of March, 1811. 3. That the power of Virginia to legislate for this part of the District of Columbia, ceased on the first Monday of December, 1800, when, by law, and in fact, the district became the seat of the government of the United States, and consequently the Act of Virginia of the 21st of January, 1801, extending the charter, was not a law in force in this part of the district on the 27th of February, 1801, when Congress enacted, that the laws of Virginia, as they then existed, should be and continue in force here. 4. That by the rule of this court, the return day of all writs returnable to this Court, is the day next after the close of the session.

Mr. Simms, in reply. By the Act of Virginia, of 3d of December, 1789, ceding this territory to the United States, it is expressly provided, "that the jurisdiction of the laws of this commonwealth, over the persons and property of individuals residing within the limits of the cession aforesaid, shall not cease or determine until Congress, having accepted the said cession, shall by law provide for the government thereof under their jurisdiction, in manner provided by the article of the constitution before recited." And by the Act of Congress of 6th July, 1790, [1 Stat. at Large, 130,] accepting the cession, it is provided, "that the operation of the laws of the State shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide." Congress did not provide for the government of the district under their jurisdiction, until the 27th of February, 1801. Virginia, therefore, had a right to legislate for this district until that day, and the Act of Virginia, of 21st of January, 1801, was valid and effectual to extend the charter of the bank, until the 4th of March, 1811.

Hodgson v. Marine Insurance Company of Alexandria.

The COURT refused, upon this motion, to decide the questions as to the existence of the bank, and as to the admission of the statute-book in evidence of the charter, but laid the rule on the defendant to plead by 10 o'clock, A. M., of the next day.

At the expiration of the rule, — *Mr. Youngs* and *Mr. Jones*, for the defendant, made the same objections to pleading which *Mr. Youngs* had made to the laying of the rule to plead; and, after argument by *Mr. Simms* and *Mr. F. L. Lee*, for the plaintiffs, and *Mr. Youngs*, *Mr. Jones*, and *Mr. E. J. Lee*, for the defendant, —

The COURT was of opinion, that the defendant ought to be ruled into a trial at this term. It is not necessary for this Court to decide the question, whether the Legislature of Virginia could legislate for the District of Columbia, after the first Monday of December, 1800. Because it is the opinion of the Court that the Act of Congress of 27th of February, 1801, [2 Stat. at Large, 103,] adopted and thereby reenacted all the laws of Virginia, then in force in Virginia, so far as they were applicable to the circumstances, and to the inhabitants of this district.

There is nothing in that act which forbids such a construction. The act of 21st of January, 1801, if sufficiently authenticated, must be admitted to have been a law of Virginia, in force on the 27th of February, 1801, and therefore within the letter of the act of Congress passed on that day; and inasmuch as it is a law applicable to the circumstances of this district, it is certainly within the spirit of that act. If the Act of Virginia, of January 21st, 1801, be one of the laws of Virginia, adopted by the Act of Congress of 27th of February, 1801, it is the opinion of the Court that it needs no other authentication than the other laws of Virginia adopted by the same act of Congress, which in effect has reenacted it as if *in totidem verbis*; and being thus reenacted by a public act, it becomes itself a public act.



HODGSON v. THE MARINE INSURANCE COMPANY OF ALEXANDRIA.

If there be no warranty of neutrality in the policy, it covers belligerent risks.

Upon a valued policy, a misrepresentation as to the size and age of the vessel is no defence; although averred to be material as to the contract.

It is no defence to an action of covenant on a policy, that the premium has been perpetually enjoined.

THIS was an action of covenant on the same policy as that in *Straas's case*, [ante, 343.]

The 1st count avers the interest to be in *Straas & Leeds*. The

2d avers it to be in Leeds alone. The loss is stated to be by capture.

Issue was joined upon the three first pleas.

The 4th plea was, that the vessel insured was the property of enemies of Great Britain, and was captured and condemned as such by the British, whereas the insurance was made only upon the property of American citizens in which no belligerent was interested.

To this plea the plaintiff demurred; and the Court adjudged the plea bad, because, inasmuch as there was no warranty of neutrality, the policy covered war-risks.

The 5th plea averred the rule and practice of the insurance company to be, never to insure beyond the reasonable and just value according to the representation. That the plaintiff proposed that the value should be agreed to be ten thousand dollars; and that to induce the defendants to execute the policy he represented the vessel to be about two hundred and fifty tons burden, and between six and seven years old; in consequence whereof, the defendants executed the policy. That this representation was not true, the vessel being less than one hundred and sixty-five tons, and more than eight years old, and not worth eight thousand dollars, (the sum insured,) being worth only three thousand dollars. That the misrepresentation induced the defendants to execute the policy stating the value to be ten thousand dollars, and insuring eight thousand; and so the policy is void as to them.

The Court, also, upon demurrer, decided this plea to be bad, because the misrepresentation did not appear, and was not averred to be material or fraudulent.

The 6th plea averred the same misrepresentation, and that it was "material in regard to the said contract of insurance, and so they said the said contract is void as to them."

The replication averred, that the misrepresentation was not material in regard to the ability of the vessel to perform the voyage insured.

The rejoinder reiterated the averments of the plea. To this there was a demurrer.

Mr. Swann, for the plaintiff, cited *Thoroughgood's case*, 2 Co. 9; *Bright v. Ennyon*, 1 Burr. 390; 1 Fonb. 106, 111, 112; *Colins v. Blanton*, 2 Wils. 341, 344; *Duffield v. Scott*, 3 T. R. 374; *Hayward v. Rodgers*, Smith's Rep. 209.

But the COURT (DUCKETT, J., absent,) were of opinion that the defendants' 6th plea and rejoinder were good, and that the plaintiff's replication was bad, being of opinion that a material misrepresentation of the subject of insurance might be pleaded in bar of

a sealed policy, and that the misrepresentation was material to the contract.

The 7th plea was, that the vessel insured was the property of a citizen of France, and not of a citizen of the United States. That there was war between France and England at the time of the insurance and at the time of capture. That the United States were neutral. That Richmond is the capital of one of the United States.

The COURT, upon demurrer, adjudged the plea to be bad, because the policy covered war-risks.

The 8th plea was that the plaintiff had not paid the premium, and that the note given therefor was perpetually enjoined by the High Court of Chancery in Virginia.

The COURT, upon demurrer, adjudged this plea also to be bad.

Judgment for the defendants on the demurrer to the 6th plea, and for the plaintiff on the others.

This judgment was reversed by the Supreme Court as to the 6th plea, and affirmed as to others. See 5 Cranch, 100.



PEIRCE v. REBECCA TURNER, Executrix *de son tort* of Charles Turner.

A marriage settlement of the intended wife's goods, although not recorded, protects the goods from the creditors of the husband.

THIS was an action brought by a creditor of Charles Turner, deceased, charging the defendant as executrix *de son tort*, under the circumstances stated in a special verdict (set forth in 5 Cranch, 154,) the substance of which was, that the defendant, before her intermarriage with her late husband, Charles Turner, executed a deed to certain trustees, by which the slaves in question were settled on her and her husband during their joint lives and the life of the survivor, remainder to her heirs, &c.; which deed was not proved and recorded within the time prescribed by the fourth section of the Act of Assembly of Virginia, of December 13th, 1792, c. 90, p. 157, whereby it became void, "as to all creditors and subsequent purchasers;" by virtue of which deed and the consent of the trustees the slaves continued in the possession of Charles Turner during his life, and in that of the defendant afterwards. No person having applied for administration, it was, by the County Court of Northumberland, committed to the sheriff of that county, where he died, and where the slaves then were. The sheriff administered the assets, but never claimed these slaves as the estate of the deceased.

Patton v. Violet.

The principal question arising upon this special verdict was, whether these slaves were a part of the personal estate of Charles Turner, at his death, and whether the widow can be charged, as *executrix de son tort*, in respect thereof.

On behalf of the plaintiff it was contended by *Mr. Taylor*, *Mr. Swann*, and *Mr. E. J. Lee*, that this property is liable to every creditor to whom it would have been liable if the deed had not been executed; and that if the deed had not been executed the property would, by the marriage, have been vested absolutely in the husband and liable for his debts. That the deed being void, it is as if it had never been executed; and they cited *Edwards v. Harben*, 2 T. R. 587; 2 Bac. Ab. 605; Buller's N. P. 258; *Hawes v. Leader*, Cro. Jac. 271; S. C. Yelv. 196; *Paget v. Priest & Porter*, 2 T. R. 97; Toller on Executors, 17; 11 Vin. Ab. 211; *Read's case*, 5 Co. 33; *Ferrars v. Cherry*, 2 Vern. 384; *Mertins v. Jolliffe*, Ambler, 313; Forester, 187; *Lowther v. Carlton*, 2 Atk. 242; Sugden's Law of Vendors, 488.

Mr. F. L. Lee, *contra*, contended, that if the deed was void as to creditors, it could be void only as to the creditors of Rebecca Kenner, (Mrs. Turner,) not of her husband; for the deed was good between the parties, and effectually prevented the title from vesting in the husband by the marriage. The creditors mentioned in the statute are the creditors of the grantor, not of the grantee. He cited Co. Lit. 351; 4 Viner, 45, 46; *Lady Strathmore's case*, 2 Bro. C. C. 351; 6 Bac. Ab. 386, 391; 1 Inst. 281; 16 Vin. 203, 205; *Miles v. Williams et ux.*, 1 P. Wms. 257, 258; 4 Vin. 132; *Norton v. Turvill*, 2 P. Wms. 144; *Bethell v. Stanhope*, Cro. Eliz. 810; 1 Fonb. Ch. 2, § 6; Prec. in Ch. 22; and *Eppes v. Randolph*, 2 Call.

January 7, 1808. The COURT (DUCKETT, J., absent,) rendered judgment upon this special verdict, for the defendant.

Judgment affirmed in Supreme Court of the United States. 5 Cranch, 154.

 PATTON v. VIOLETT.

In Virginia the insolvency of the maker of a promissory note excuses the holder for not suing him and obtaining judgment, &c., before suing the indorser.

An indorsement of a blank paper, with intent to give credit to the maker of a promissory note which should afterwards be written thereon, is obligatory, although no other consideration passed from the indorsee to the indorser; and authorizes the maker to make the note in the manner intended at the time of the indorsement.

It is no bar to the plaintiff's recovery in this action that the maker had, at the time the note became payable, property enough to pay this debt, and that he and the plaintiff both resided in the same town, and that the plaintiff brought no suit against the maker.

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The insolvency which will excuse the plaintiff for not bringing suit against the maker, must be such as, in the opinion of the jury, would render a suit fruitless.

If the maker was solvent at the time the note became payable, and during such solvency the defendant requested the plaintiff (but not in writing) to sue the maker, and he did not, the defendant is discharged from liability, under the equity of the Statute of Virginia 23d December, 1794, "concerning debtors and their securities."

THE declaration was upon a promissory note, made by Brooke, payable to Violet or order, and by him assigned, by indorsement, to the plaintiff; and averred demand of payment from Brooke, his refusal and insolvency at the time of demand, and notice thereof to Violet.

Upon the trial of the general issue, the COURT, (DUCKETT, J., absent,) at the prayer of the plaintiff, instructed the jury, in effect, that if the defendant indorsed the note, with intent to give credit to the maker with the plaintiff, for the amount of the note, and the plaintiff did thereupon give such credit, the circumstance that the indorsement was made before the note was filled up, was no bar to the plaintiff's recovery in this action, although the defendant received no other consideration for his indorsement than the credit thus given by the plaintiff to Brooke upon the faith of the note; and that such indorsement authorized Brooke to fill up, and make the note in the form in which it appears to have been made; and that the circumstance, that the body of the note was in the plaintiff's handwriting, was wholly immaterial to this issue.

And the COURT refused to instruct the jury, as prayed by the defendant, that if they should be satisfied by the evidence, that Brooke had property enough to pay this debt at any time after the note became payable, and that the plaintiff had remained in the same county with him, and had not brought suit against him, he could not recover in this action.

The COURT also said that the insolvency, to excuse the not bringing a suit, must be such as would, in the opinion of the jury, have rendered a suit fruitless.

The COURT also, at the suggestion of the defendant's counsel, expressed an opinion, that under the equity of the Virginia statute of 23d December, 1794, "concerning debtors and their securities," the defendant is discharged from his liability upon the note, if, after the note became payable, and while the maker was solvent, the defendant requested the plaintiff to sue the maker, and he did not; although such request was not in writing, as required by the letter of the statute.

See *Vowell v. Lyles*, at July term, 1807, [*ante*, 428.]

WILSON v. McCLEAN & WINTERBERRY.

When a witness states the grounds of his belief of a material fact, his belief, together with the reasons of his belief, are proper evidence to be left to the jury.

In a deposition the deponent said, he "*believed the goods were for the house of McClean & Winterberry, as they were shipped to McClean & Winterberry at Alexandria.*"

Mr. Youngs, for the defendant, moved the Court to strike out the words above, (in italics) which the COURT refused, because the witness has stated the grounds of his belief. DUCKETT, J., absent.

GILL v. PATTEN.

Permanent and useful improvements made upon the land, may be given in evidence in mitigation of damages, in an action of trespass for mesne profits, brought after recovery in ejectment.

THE question submitted to the Court, in this case was, "Whether valuable and permanently useful improvements made upon the land, may be given in evidence in mitigation of damages by the defendant in an action of trespass for mesne profits, brought after a recovery in ejectment."

Mr. F. L. Lee, for the defendant, submitted the following written argument.

May improvements be *recouped* in an action of trespass for mesne profits?

1st. Permanently useful improvements were *recouped* in the action of assize of novel disseisin at common law. 2d. They were *recouped* in the action of trespass with *continuando* when brought after an entry. 3d. They may, and for particular reasons ought, to be *recouped* in the same action when brought after a recovery in ejectment.

1. When a man has been disseized of his estate and kept out of possession, he is or may be injured in three respects; by the loss of his land, by the loss of the profits, and by injury done to the estate itself. For all these injuries he ought to be indemnified; but they do not all happen in every case. For this reason the remedies are various, so as to suit each case.

Illustration. When the ancestor was disseized, and nothing has descended to the heir but the mere right to the land, he may recover the land in the writ of entry, but he is entitled to no damages, because the waste and the disseisin done in the lifetime of the ancestor have died with him, and the waste done since is no

trespass to the heir who has not entered ; and as to the profits, the wrongful person was permitted to keep them to pay the feudal services, &c. 3 Bl. Com. ch. 10, p. 187, 188. The heir having sustained but one of the before-mentioned injuries, the loss of the land, has a specific remedy to recover that, and nothing else.

If the ancestor died seized, and a stranger abated, the heir might recover the land in a writ of *mort d'ancestor*, but no damages, for the reasons before mentioned. 3 Bl. Com. c. 10, p. 185; 2 Inst. 286. But if the heir had entered, and a stranger put him out of possession, all the before-mentioned injuries were sustained ; and therefore for this new disseisin he might recover the land and damages in the writ of assize of novel disseisin. 3 Bl. c. 10; 2 Inst., and Booth's Law of Real Actions. In the assize of novel disseisin, the demandant counted on an actual possession in himself ; and for the trespass done to that possession by the disseisin, the damages were given. Hence this action was called a mixed action, (Sayer's Law of Damages) because it partook of the nature of a writ of entry so far as it regained the land, and of the nature of a writ of trespass so far as it gave damages. But although the demandant was entitled to damages, it was not necessary to pay him in money. It is enough that he receive something valuable, which will put him in as good a situation as if he had not been disseized ; for that is the object of the writ. He may therefore be paid for the profit by improvements. "He who recovers the land shall have the emblements, but the assize *recouped* the damages because the land was sown." 9 Viner, tit. Emblements, 369, cites Brooke, Emblements 11 ; 24, E. 3, 50. "Damages to 40s. found by the assize, and no more, because the land is well sown and the house mended, and so *recouped* the damages." 8 Vin. tit. Discount. "In assize the plaintiff recovered the land and no damages, because the place was well amended by building. 8 Vin. tit. Discount. "Disseisin done *ad damnum* £9, disseizor sows the land which is worth £10 ; and the assize gave £9 damages ; *per Cur.* they shall be attainted for not *recouping* the sowing." 8 Vin. tit. Discount. "In divers cases one who is in of his own wrong shall *recoupe* and retain. The disseizor shall *recoupe* in damages all that he hath expended in amending the houses." *Coutler's case*, 5 Coke, 30. In *Penrice v. Penrice*, a writ of inquiry in dower was quashed because the jury omitted to deduct the chief rents and repairs. Barnes' Notes, 234.

2. It seems then that in assize of novel disseisin, which was the only action in which damages were given for mesne profits, improvements were *recouped*, and there can be no difference in this respect between the actions of assize and trespass with *continuando*. When a man is out of possession he may recover his

land at common law by entry or by action. If my ancestor was disseized, I may recover the possession by entry, if that right has not been tolled; but I could have no action for damages, for the same reason that I could get none in the writ of entry. Trespass with *continuando* does not lie, because there was no former possession in me to which my entry could relate, so as to give me that possession during the interim, upon which the action of trespass with *continuando* is founded. *Liford's case*, 11 Coke, 51. If my ancestor died seized and a stranger abated, I could recover the land by entry; but had no action for damages. Trespass with *continuando* does not lie against an abater after entry by the heir. 20 Vin. 463, 464; Bl. Com. *causa qua supra*. But if I was myself disseized, I may recover the land by entry, and then sue for damages in trespass with *continuando*. 11 Coke, 51. The action of trespass is here brought and allowed for the same reason that damages are given in assize of novel disseisin, the trespass done to the actual possession of the disseized. Entry followed by trespass with *continuando* was just equivalent to the action of assize; and they were alternative remedies for the same injury. Their very near resemblance in many particulars is singular. In assize, "a man shall recover damages for all injury done to the estate itself;" so in trespass with *continuando*, he may "recover for all and any injury done during the disseisin." 20 Vin. 464. In assize "he shall recover to the value of the issues of the land." 7 Vin. 267. And in trespass with *continando* "he shall recover the natural and artificial profits." 11 Coke, 51. If it appear in assize that "the trees which the disseizor cut were used in mending the houses, they shall be *recouped*." 8 Vin. 557. So in trespass with *continuando* "if the disseizee hath himself taken any of the corn, grass, or trees, they shall be *recouped*; for in both cases, the disseizee has back his property." 11 Coke, 52. At common law the demandant in assize could only recover damages from the disseizor himself and not from his alienee; but the statute of Gloucester gives damages against the latter. So at common law the action of trespass with *continuando* could only be sustained against the disseizor, (1 Hob. 98); but it is certain that since the statute this action has been sustained against the alienee of the disseizor. Cro. Eliz. 540. To conclude the resemblance, Coke says in *Liford's case*, "that I shall recover in this action of trespass in the same manner that a disseizee shall recover against his disseizor in assize at common law." Entry, followed by trespass, was the usual remedy when the disseisin was fresh, and assize when it was ancient. 1 Reeves's History, 324. Hobart says "if the disseizee has reëntered and thereby lost his assize, he may have trespass with *continuando* for the mesne profits." Hob. 98. He may re-

cover the profits in trespass, because he can no longer have assize for them; and clearly therefore he must recover them in the same manner in both actions. If then a *recouper* of improvements was allowed in one action, it must have been in the other, for they were alternative remedies for the same injury. So far as the assize gave damages, it was in nature of trespass; and the form of the action of trespass is favorable to *recoupers*, for Coke says, as before mentioned, that if the disseizee "himself take any of the corn or trees, they shall be *recouped*," and it is a common thing, in an action of trespass, for the ouster of a personal chattel to show that the article has been restored, in order to mitigate damages. It is said in 12 Vin., tit. Evidence, 158, "the law is that in trespass for goods taken the plaintiff shall recover the value of them; yet if the plaintiff *re-has* the goods this may be shown in evidence to mitigate the damages." If I may show that I have carried back the plaintiff's trees, I may certainly show that I not only carried them back but also built him a fence with them. If he may show, to increase damages, that when I broke his close, I trample down his corn, I may show in mitigation of the damage, that I mended his gate. It may be said, therefore, with certainty, that *recoupers* were and might be made in the action of trespass with *continuando*, when brought after entry.

3. And they may and should be made in that action when brought after a recovery in ejectment.

When a man has recovered possession of land by a modern action of ejectment, he is precisely situated like a disseizor after entry at common law; that is, he has got his land and no damages. He could get no damages on the ejectment, because the parties were fictitious; and he was obliged to get the possession in that way, because he is prohibited by the statute from making a forcible entry. After having recovered the possession he proceeds with the old action of trespass, which was formerly brought after an entry. All the *recoupers* which were formerly admissible in this action ought to be admitted now. There are many strong reasons for it. The recoverer in a modern ejectment must be either a freeholder or a termor. If a freeholder, he ought not to be placed in a better situation, as to the defendant's right of re-tainer, by the fictions of the court, than he was by the old law; and by the old law the improvements would be *recouped* in either of the alternative remedies which the plaintiff might elect to pursue. If he be a termor, he should not be placed in a better situation as to this particular by the awarding of the writ of possession than he was before the courts undertook to award that writ. By the old law the plaintiff recovered in ejectment the value of the whole term, but the term itself remained in the hands of the de-

fendant. 3 Bl. Com. 300. The defendant was safe as to his improvements, because they remained on the land which he retained during the term. But the courts undertook to give back the term specifically to the plaintiff and invented the writ of possession in the time of Henry VII. for that purpose. 3 Bl. 201; Runnington on Ejectment. "The writ of ejectment was now licked into the form of a real action," (*Goodtitle v. Tombs*, 3 Wils. 120,) and the damages must have been of course, lowered from the full value of the whole term to the value of the profits generally; (3 Wils. 121,) and because this action now assumed the form and the effect of a real action, it must also have taken the character of a real action as to the defendant's right of retainer for improvements. Why did the courts of law award the writ of possession? Blackstone and Runnington say, to prevent the plaintiff from going into chancery for a restitution of the land. Now if the courts had not allowed the defendant *recouper*, he would have been driven into chancery for relief; but they would certainly never have invented a writ to relieve the plaintiff from going into chancery, and drive the defendant there unnecessarily.

CRANCH, C. J., delivered the opinion of the Court. (DUCKETT, J., absent.)

Before the fictitious action of ejectment was devised by the courts, and took the place of real actions, the true action of ejectment was brought only by the termor himself against the actual ejector, and the term itself was not recovered, but only damages to the value of the residue of the term yet to come; but the actual ejector still retained possession of the land; and by this means secured the benefit of all his improvements. When the fictitious action of ejectment was devised, it can scarcely be supposed that the court intended to deprive the defendant of any reasonable benefit which he had before in the old form of action; for "*in fictione juris semper æquitas existit*."

Again, the fictitious action of ejectment was a substitute for the assize of *novel disseisin*, the assize of *mort d'ancestor*, or for an actual entry, so far only as the assize or the entry, restored the disseizee to the actual possession of the land. It did not, like the assize, afford a remedy for the damages sustained by the disseizee by being kept out of possession, or by actual injury done to the land and premises. This defect arose from the circumstance that the parties were fictitious. It required the subsequent action of trespass for the mesne profits, in addition to the fictitious action of ejectment, to make the remedy equivalent to an assize.

Where the disseizee regained his possession by reëntry, he was entitled to the action of trespass with a *continuando* for the mesne

profits; and in the assize and in the action of trespass after re-entry, the defendant was permitted to show, in mitigation of damages, that he had sowed the land, or otherwise increased its value by improvements.

The Court thinks that the action of trespass for the mesne profits, after a recovery in the fictitious action of ejectment, is strictly analogous to the action of trespass with a *continuando* after an entry, and to that part of the remedy by assize which gave the defendant his damages, and is accompanied by the same equitable defence.

The opinion of the Court, therefore, is, that the improvements mentioned in the case agreed, may be given in evidence in mitigation of damages in the present action.

MILLER v. BUTLER.

A bill of exchange may be accepted, by the drawee's writing the word "accepted" upon it.

In an action by the indorsee, against the acceptor of a bill of exchange, drawn for the amount of an award, the acceptor cannot avail himself of a mistake of the arbitrators in making up the award.

ASSUMPSIT on an inland bill of exchange, drawn by Reed on the defendant, in favor of W. Hartshorne, Jr., or order, stating it to be the amount of an award between Reed and the defendant, which bill was underwritten, "*Excepted*, Tristram Butler," in the handwriting of the defendant. Hartshorne indorsed it to the plaintiff.

Mr. Swann, for the defendant, objected that that was not an acceptance, but the COURT (DUCKETT, J., absent,) overruled the objection.

Mr. Swann then offered to read the award, (Hartshorne being one of the referees who had signed the award,) and to read an acknowledgment by the arbitrators made subsequent to the award, that if a certain affidavit (then produced,) had been produced to them before the award, it would have reduced their award sixty dollars, and contended that the defendant had a right to discount those sixty dollars against the plaintiff.

But the COURT rejected the evidence, the bill being negotiable, and in the hands of a third person.

MILLER v. MOORE.

In an action by the indorsee of a promissory note against the maker, the plaintiff need not produce written evidence of the authority of the indorser's agent to indorse.

DEBT on a promissory note, made by Moore to W. T. Alexander, or order, for value received, negotiable in the Bank of Alexandria; indorsed, "Pay to Richard and Stephen Winchester, or order" — signed, "William T. Alexander, by his attorney in fact, John T. Wellford" — and "pay Mordecai Miller," (signed) "R. & S. Winchester."

Mr. Swann, for the defendant, contended that the plaintiff must show a written authority from W. T. Alexander to John T. Wellford, to indorse and transfer the note.

But the COURT permitted parol (*vivâ voce*) testimony to be offered, to show that Wellford was an agent for Alexander, and that he had been accustomed to indorse the name of Alexander on notes, and that Alexander had sanctioned such indorsements.

BARNES v. LEE, Bail of D. Easton.

A clerical error in the record may be amended after the term.

AFTER the Court had given an opinion on the law, upon the issue of *nul tiel record*, (*ante*, p. 430,) but before the judgment thereon was entered on the minutes, —

Mr. Jones, for the plaintiff, moved to quash the *scire facias*, which the COURT granted on payment of all costs. Mr. Jones then moved the Court to direct the clerk to amend the record by the minute-book. On *certiorari* upon suggestion of diminution, the Court below will order a clerical mistake to be corrected.

Mr. E. J. Lee, *contrâ*. Errors in the office can only be corrected at the next succeeding term. The Court cannot correct even a clerical error after the term. The minutes of the District Court of Virginia, are full and complete records at length.

Mr. Jones, in reply. This is a misprision of the clerk. The record is not made up during the term. The clerks make them up in vacation from the minutes, hence the minutes are directed by law to be signed. Virginia Law of 12th December, 1792, § 46, p. 81, § 28, p. 78; Virginia Law, 3d December, 1792, § 35,

p. 89; *Norton's case*, Style, 110; *Lovell v. Natchford*, Id. 120; *Frazier v. Crosbie*, 2 Wash. 130; *Poynes v. Francis*, Style, 191; *Sanderson v. Raisin*, Id. 209; *Dawkes v. Payton*, Id. 218, 219; *Pinder v. Dawkes*, Id. 232; *Friend v. Baker*, Id. 339; *Kitchinman's case*, Id. 374; *Barker v. Elmer*, Id. 412.

Mr. E. J. Lee. The minute-book, in this case, does not describe the form of the recognizance, so that there is nothing to amend by.

The COURT gave leave to amend.

DIXON'S ADMINISTRATOR v. RAMSAY'S EXECUTORS.

Counts charging the defendants as executors, upon the promise of their testator, and upon their own promise as executors, in consideration of assets, may be joined in the same declaration, and the judgment upon each count will be *de bonis testatoris*.

THE declaration contained six counts, but made no *profert* of the plaintiff's letters of administration. The 1st count was on the promise of the testator. 2d. Same, *quantum valebant*. 3d. Money had and received by the testator. 4th. A promise by the defendants as executors in consideration that testator was indebted and in consideration of assets. 5th. *Insimul computasset*, and a similar promise by the defendants as executors in consideration of assets. 6th. That two of the executors accounted as executors with plaintiff and a like promise. General demurrer to the declaration.

Mr. Taylor, for the defendants, contended that the counts were such as cannot be joined, and that such misjoinder may be taken advantage of upon general demurrer, and so may the want of *profert*. The letters of administration are part of the plaintiff's title to recover, and without *profert* the defendant is not entitled to *oyer* of them. Before the statute, the want of *profert* was fatal on general demurrer, for it was matter of substance. Com. Dig. Pleader, O, 17. There is a difference between the Virginian and the English statute of *jeofails*. The Virginia act does not specify what shall not be fatal on general demurrer. It must, however, be the want of something necessary to the justice of the case. An account stated by executors, as executors, is a personal undertaking; where the default of the executor is the cause of action, the judgment is *de bonis propriis*. Com. Dig. Pleader, 2 D. 15. If the judgments upon the respective counts are to be against the defendants in different rights, the counts are incompatible, and there can be no correct judgment rendered upon them.

Lyles v. The Common Council of Alexandria.

Mr. E. J. Lee, for the plaintiff, cited the cases of *Courtney v. Hunter's Administrator*, [*ante*, 265,] and *Henderson v. Parson's Executors*, at November term, 1805, (not reported,) and *Faxon & Co. v. Dyson's Administrators*, at the last term, [*ante*, 441.]

The COURT (DUCKETT, J., absent,) without hearing the other side, decided, upon the authority of those cases, that the judgment upon the demurrer ought to be for the plaintiff.

SCOTT v. WISE.

A prison-bonds bond may be assigned by a deputy-marshal.

THE COURT (DUCKETT, J., absent,) decided, upon general demurrer, that an assignment of a prison-bonds bond by the deputy-marshal, in the name of the chief marshal, was a good assignment. The assignment, on *oyer*, appeared to be signed "R. Moss, deputy-marshal, for D. C. Brent, marshal of the District of Columbia." See Virginia law, 24th November, 1792, p. 119, § 2.

LYLES v. THE COMMON COUNCIL OF ALEXANDRIA.

A declaration against "the Common Council of Alexandria," for work and labor done for "the Mayor and Commonalty," must show how the new corporation is liable for the debts of the old.

THIS was an action of assumpsit for work and labor done by the plaintiff for the town of Alexandria, under its old charter of 1779, when its corporate name was "The Mayor and Commonalty of the Town of Alexandria," and this suit was brought against the corporation under its new charter of 1804, by the corporate name of "The Common Council of Alexandria." The declaration stated the work was done for the mayor and commonalty, &c., but did not aver that the new corporation, (the common council, &c.) was liable for the debts of the old, nor refer to the new charter by which it was so made liable.

And for this cause the COURT (DUCKETT, J., absent,) arrested the judgment.

Mr. E. J. Lee, for the plaintiff.

Mr. Taylor, for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1807, AT WASHINGTON.

SOMMERVILLE v. FRENCH.

The Court will send attachments into Maryland for witnesses who reside within one hundred miles of Washington, if they fail to attend according to summons.

W. W. BERRY having been summoned by the marshal of the District of Columbia, to attend as a witness for the plaintiff in this cause, and failing to attend when called, —

The COURT, on motion of *Mr. Morsell*, for the plaintiff, ordered an attachment, directed to the marshal of Maryland; it being suggested that the witness resides in Maryland. (DUCKETT, J., absent.)

Several other attachments were issued in the like case at this term.

UNITED STATES v. DONAHOO.

In forcible entry and detainer, it is not necessary that it should appear upon *certiorari*, that the inquest was taken on the spot where the force was used; nor that the jurors should appear to be qualified according to the requisites of the common law.

INQUISITION for forcible entry and detainer brought up by *certiorari*.

Mr. Morsell moved to quash the inquisition, because the inquest was not taken on the spot where the force is alleged to have been used, and because it did not appear that the jurors had the common-law qualifications of grand jurors; this being a proceeding at the common law.

Mr. F. S. Key, contra. The issue is joined below on the traverse of the force, and the proceedings were there arrested by the *certiorari*. The defendant cannot take advantage of any thing but what would avail him in arrest of judgment. The warrant to the marshal is, to summon sufficient and indifferent persons to inquire upon their oath, &c., and it does not appear on the proceedings that they were not sufficient.

The COURT (FITZHUGH, J., absent,) refused to quash the inquisition on either of the grounds suggested.

FERRIS & GILPIN v. WILLIAMS.

The plea of *non assumpsit infra tres annos* is not a good plea to a count upon a promissory note, payable thirty days after date.

The State of Delaware is beyond seas, in regard to the District of Columbia, within the meaning of the statute of limitations.

THE declaration was upon a promissory note, payable thirty days after the 14th of April, 1798, made at Wilmington in Delaware, viz.: at Washington county, District of Columbia.

Plea 1. *Non assumpsit* and issue. 2. *Non assumpsit infra tres annos*. 3. *Actio non accrevit infra tres annos*.

General demurrer to the second plea.

Replication to third plea, that the note was made and delivered, and the money due thereon, was a debt contracted by the said Thomas Williams with the plaintiffs, abroad in foreign parts beyond the seas, to wit, at Wilmington, in the State of Delaware, in the United States of America, and the plaintiffs continued and remained abroad in foreign parts, beyond the seas, as aforesaid, at the place aforesaid, from the time aforesaid, and long before, and always since, and at this time; and this the plaintiffs are ready to verify. General demurrer to that replication and joinder.

Mr. Law, for the defendant, cited the Act of Limitations of Maryland, 1715, c. 23; and *King v. Walker*, 1 W. Bl. 286; and *Ward v. Hallam*, 2 Dallas, 217.

Mr. Morsell, for the plaintiff, mentioned the case of *Pancoast v. Addison*, in which the General Court of Maryland, after full argument and great deliberation, decided that another State of this Union is beyond seas within the meaning and reason of the statute.

Judgment for the plaintiffs upon the demurrers.

 UNITED STATES v. W. SMITH.

Logs in a fence are not the subject of larceny, the fence being in law annexed to the freehold.

INDICTMENT for stealing fence-logs, the property of John Orr, from a worm fence. The fence consisted of ten logs, two supporting a rider.

Mr. Morsell and Mr. Caldwell, for the defendant, contended that it was not larceny, but trespass. The fence is part of the freehold, and would have gone to the heir, and not to the executor. It could not be taken in execution. Orr was the tenant of

McLaughlin's Adm'r v. Turner.

W. Brent. *Mr. Caldwell* contended, the fence was the property of W. Brent, (which Orr admitted in his testimony,) and not of Orr.

The Court instructed the jury that it was a felony; but having doubts, said they would hear a motion for a new trial or in arrest of judgment, if a verdict of guilty should be found — which was found accordingly.

And on consideration, the COURT, (*nem. com.*) was of opinion that it was no felony; that the fence was to be considered as annexed to the freehold, and would descend with the land to the heir, and would not go to the executors.

Judgment arrested.

McLAUGHLIN'S ADMINISTRATOR v. SAMUEL TURNER.

Upon a count "for sundry matters properly chargeable in account, as by account annexed," it is not necessary that the account should be such as would be evidence *per se* under the Act of Maryland, 1729, c. 20.

The day stated in the declaration is not material, so that the articles were delivered and payable before the action brought.

THE 1st count of the declaration stated that the defendant was indebted to the plaintiff "for sundry matters properly chargeable in account, as by an account thereunto annexed." The 2d count was for board and lodging, and other necessities for twelve months.

The plaintiff produced an account for a tavern-bill, and proved that he presented the account to the defendant, who said there were other credits on a former account, and he would produce them and settle the account.

Mr. Caldwell and *Mr. Morsell*, for the defendant, contended that the evidence did not support the first count, and that no evidence could be given upon that count, but an account which would in itself have been evidence under the act of 1729, c. 20, under which act alone they contended the count was good. The issues were *non assumpsit* and limitations. There was no demurrer.

But the COURT (*nem. con.*) said, if the count is bad, he might have demurred, or might move in arrest of judgment. But if the count is good, there can be no question but that the evidence offered will support it.

Mr. Morsell contended also, that the plaintiff could not give in evidence any charge for articles delivered before the 4th of May, 1805, the day laid in the declaration.

But the COURT (*nem. con.*) said the day was immaterial, so that the articles were delivered and payable before the action brought.

Negro Reason v. Bridges.

LEE v. WELCH.

When a bond for the payment of money is filed, an affidavit to hold to bail is not necessary, and the Court will not mitigate the bail upon affidavit that the whole is not due; nor receive as bail persons not resident in the district.

THIS was an action of debt on a bond in the penalty of six thousand dollars. There was an indorsement, the precise meaning of which could not well be understood.

Mr. F. S. Key objected, that there ought to have been an affidavit to show the precise amount claimed by the plaintiff, and moved for leave to appear for the defendant without special bail.

But the COURT (*nem. con.*) upon the authority of *Smith v. Watson*, June, 1806, in this Court, [*ante*, 311,] overruled the objection.

Mr. Key then moved the Court to limit the amount of bail to a certain sum, and said he could produce an affidavit that the whole was not due.

But the COURT refused, and also refused to receive persons resident in Baltimore as bail. The defendant was committed.

WILSON v. KEDGELEY.

TRESPASS *vi et armis* lies by the owner of a slave against a stranger who beats the slave
per quod servitium amisit.

TRESPASS *vi et armis*, for beating his slave, whereby he lost his services.

Mr. F. S. Key moved in arrest of judgment, that trespass *vi et armis* does not lie by the master in such a case. But it ought to have been trespass on the case.

Motion overruled. See *Esp. N. P.* 380, 598; 3 *Bl. Com.* 393.

NEGRO REUBEN REASON v. JOHN BRIDGES.

If, after eight jurors have been sworn in chief, the defendant challenge one for favor, the challenge shall be tried by the jurors already sworn.

A juror shall not be examined on oath as to his religious opinions, on the subject of slavery, nor will the Court, on a challenge for favor, suffer evidence to be given to the triors as to the prevailing opinion of individuals of the religious sect to which the juror belongs.

PETITION FOR FREEDOM. The defendant having challenged twelve of the jurors peremptorily, challenged *Mr. Smith*, one of

Negro Reason v. Bridges.

the tales, for favor. Eight jurors having been sworn, were sworn as triors.

The COURT refused to suffer Mr. Smith to be examined on oath as to his religious opinions, whether he was a Methodist, and whether the Methodists had religious scruples as to the legality of slavery. A witness was sworn, who testified that it was not an essential tenet of their religion that slavery was contrary to the divine law; but some of them were of that opinion.

The Court refused to permit the witness to be asked whether it was the prevailing opinion among the people called Methodists, and decided that it was incumbent on the party challenging to show, either that it was an essential tenet of their religion, or was the individual opinion of the juror.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1808, AT WASHINGTON.

CONTEE *et al.* v. GODFREY.

The rent-rolls and books of the lord proprietors of Maryland may be given in evidence to supply the want of a deed, and may be explained by parol.

If one of four parceners be an alien the whole descends to the remaining three.

A British subject could not, in 1793, inherit lands in the United States from a citizen of the United States.

The statute of 7 Ann. c. 5, § 3, does not apply to children born under the same allegiance with that of their father.

A decree of partition between heirs, some of whom are aliens, does not estop those who were not aliens from claiming the whole in ejectment.

A decree of partition does not pass any thing from one coparcener to another.

EJECTMENT for a tract of land called "Argyle, Cowell, and Lawn."

The plaintiff, to support his title, produced a patent from Lord Baltimore, dated December 8, 1722, to Randal Black, and a deed from John Bradford to Richard Lee, for the same land, dated August 3, 1737, but did not produce any deed from Black to Bradford. As evidence from which the jury might presume such a deed, he offered to read the entries in the Lord Proprietors' books, charging Richard Lee with the quitrents of a tract called Angle, and offered parol evidence to prove that Angle meant Argyle, Cowell, and Lawn.

Mr. P. B. Key, for the defendant, objected that parol evidence could not be admitted to explain the record.

But the COURT (CRANCH, C. J., *contrà*,) permitted the evidence to be given.

Evidence was also given of the possession of Richard Lee and his heirs down to Russell Lee, who was a citizen of the United States, and died intestate in 1793, leaving four sisters his heirs at law, one of whom (Mrs. Dawson) was a British subject at the time of his death. See *Dawson v. Godfrey*, in Sup. Ct. U. S. 4 Cranch, 321. The other three were citizens of the United States, and are the lessors of the plaintiff in this action.

The COURT (*nem. con.*) instructed the jury that if they found the facts to be as stated, they ought to presume a valid deed of conveyance from Black to Bradford.

Mr. Key, for the defendant, contended that the plaintiff could not recover the share which would have descended to Mrs. Dawson if she had not been an alien; and that the four sisters constituted but one heir. 2 Bl. Com. 187; Bac. Ab. tit. Parcener; Co. Lit. 163 (b); Co. Lit. 8 (a).

Mr. C. Lee and *Mr. Jones*, for the plaintiff, relied upon the opinion of the Supreme Court of the United States in the case of *Dawson v. Godfrey*, 4 Cranch, 321.

The COURT (*nem. con.*) was of opinion, upon the authority of that case, that Mrs. Dawson was to be considered as an alien born, and as never having had a right to inherit lands in the United States; and consequently, that the whole land descended to the three other sisters, the lessors of the plaintiff.

Mr. Key then contended, that as the father of the four sisters was born in Maryland, and was there at the time of the Revolution, he was a natural-born subject of the State of Maryland, and that his child (Mrs. Dawson) born out of the allegiance of that State, was a subject of that State, and entitled to inherit under the English statute of 7 Anne, c. 5, § 3, which he contended was in force in Maryland, by virtue of the Bill of Rights of that State.

The COURT, (*nem. con.* but not without some doubt,) was of opinion that the statute of 7 Anne, c. 5, § 3, did not protect the right of Mrs. Dawson. She and her parents were under the same allegiance at the time of her birth; and if the statute is adopted by the Bill of Rights of 1777, yet it cannot look back and make her born under a different allegiance, contrary to the fact.

Mr. Key then contended that the lessors of the plaintiff were estopped by the decree of partition made by the Chancellor of Maryland, from denying Mrs. Dawson's right.

But the COURT decided that they were not estopped.

Mr. Key then contended that Mrs. Dawson took by purchase under the decree, and not by descent; and can therefore take and hold until office found, especially as the chancellor had decreed that she should pay money to the other heirs, in consequence of having had the largest portion allotted to her in the partition.

BUT, *PER CURIAM*, the partition passed nothing from the three sisters to Mrs. Dawson. The decree cannot be enforced, as it was founded upon a mistake of the rights of the parties; and there is no evidence of the money having been paid.

Verdict for the plaintiffs. Bills of exceptions were taken, but no writ of error was prosecuted.

BYRNE v. CARPENTER, Special bail of King.

The discharge of the principal under the insolvent act, before the return of the *ca. sa.*, may be pleaded in bar to a *scire facias* against the bail.

SCIRE FACIAS. Plea, that King was discharged under the insolvent law, before the return of the *capias ad satisfaciendum*. General demurrer.

Mr. Youngs, for the plaintiff. The insolvent act provides that the discharge of the debtor shall not discharge any other person, from any undertaking, &c. The plaintiff has a right to have the defendant brought in, so that he may be served with notice of a petition to vacate his discharge.

Mr. Caldwell, contra. Whatever discharges the principal from the obligation of surrendering his body, is a discharge to the bail.

The bail cannot hold the principal in custody after his discharge under the insolvent act. Upon application to a judge, he is bound to discharge him. If the bail surrenders him, the Court must discharge him, whether the discharge is fraudulent or not. The surrender of the principal would be nugatory, and the law will not oblige a man to do a void act.

The principal, upon his discharge, may and generally does go off; and if the bail cannot hold him, it would be a hard case.

Cur. adv. vult.

December term, 1808. Judgment for the defendant, on the demurrer, (*nem. con.*)

 MCGOWAN v. TIMOTHY CALDWELL.

After a plea of general performance, a rejoinder stating an excuse for not performing is bad.

A decree for a divorce *a vinculo*, and declaring that the articles entered into previously for alimony should remain in force, is no bar to an action upon a bond given to perform those articles.

DEBT on bond for performance of covenants for separate maintenance of the defendant's wife. Plea, general performance. Replication, non-payment of annuity. Rejoinder, divorce, and decree for alimony in Vermont. General demurrer, and joinder.

Mr. Jones, and *Mr. F. S. Key*, for the defendant, contended that the bond is made void by the decree, although he admits that the covenants remain in force. When a person gets a security of a higher nature it merges the lower security. It is the same as if a

 Negro Davis v. Baltzer.

judgment had been recovered on the bond. The court of Vermont has decreed the execution of the articles; but nothing is said of the bond. The divorce *a vinculo matrimonii* dissolves all the relation of husband and wife, and all the obligations of that relation. It dissolves not only the primary obligations, but all obligations or contracts founded upon such primary obligations. If the court had decreed a less alimony, or that a smaller sum should be allowed, the bond would have been void. So if a larger sum had been allowed. The court in Vermont, decreed that in lieu of all other alimony, the articles should remain in force as if the decree of divorce had not been made.

Mr. Law and *Mr. Morsell*, in reply. The court in Vermont could not annul the bond, and discharge the surety. *Smith v. Buchanan*, 1 East, 11. McGowan, the trustee, did not get a higher security. It is not a decree enforcing the articles. The covenants are not void; the consideration has not failed; the consideration was not marriage, but separation.

The dissolution of the marriage does not dissolve agreements and contracts of the parties grounded not on the marriage but on the separation. The decree says that the covenants should not lose their effect. The court in Vermont, did not intend to discharge the covenants, or the bond given to secure their performance.

The COURT (*nem. con.*) adjudged the rejoinder to be bad; not only as a departure from the plea, but as bad in substance, the bond not being affected by the decree.

NEGRO HARRY DAVIS v. JOHN BALTZER.

The list of slaves required by the law of Maryland, 1796, c. 67, must be delivered to the clerk of the county into which they shall be first brought, and within three months thereafter.

THE COURT (CRANCH, C. J., absent,) decided that the master's entry of the slave, with the clerk of this Court, made this day, was not a compliance with the Act of Maryland, 1796; the slave having been brought into the State of Maryland, from Virginia, by Daniel Dulany, in the year 1797; and that it ought to have been made with the clerk of the Court of the county into which the slave was first brought. The slave was sold by Dulany within fourteen months after he was brought into Maryland.

Verdict for the petitioner.

McLAUGHLIN v. STELLE.

Jurisdiction. *Non pros.*

ASSUMPSIT. Verdict for \$11. *Non pros.*: it being below the jurisdiction of this Court. See *Currey v. Fletcher*, December term, 1802, [*ante*, 113.]

SMITH, USE OF HIGDEN, v. NICHOLAS L. QUEEN.

In an action of debt on a sealed note, if the verdict be reduced below twenty dollars by payments proved at the trial, judgment of *non pros.* must be entered.

DEBT, on a note under seal. There were payments proved which reduced the amount due to seventeen dollars and thirty cents.

The verdict is, "we find for the plaintiff and find the sum due on the note to be seventeen dollars and thirty cents."

Mr. Van Horne, for the defendant, moved for judgment of *non pros.*, under the Act of Maryland, 1796, c. 68, § 9.

Mr. Caldwell. The courts in Maryland are expressly limited. The jurisdiction of this Court is general. See the Act of Congress, February 27, 1801, § 5, [2 Stat. at Large, 106,] and May 3, 1802, § 4, [2 Stat. at Large, 194.]

If the defendant can defeat the plaintiff before a justice of the peace, by not pleading discount, &c.; and can defeat the plaintiff in this Court by pleading discount, the plaintiff would be totally defeated.

The plaintiff cannot always ascertain what sum he ought to credit. The defendant may refuse to settle accounts, &c. *Curia advisare vult*. December term, 1808, judgment of *non pros.* was entered. See *Woollet v. Cloutman*, Doug. 244; *Wase v. Wyburd*, Id. 246; *Ailway v. Burrows*, Id. 263; *Wiltshire v. Lloyd*, Id. 381, 382; *Pitts v. Carpenter*, 2 Str. 1191.

STODDERT & MASON v. WATERS & GRIFFITH *et al.*

Notice to dissolve an injunction must be given ten days before the term; if given in term, a term's notice is required.

MR. JONES, for the defendants, having filed answers on the first day of the term, and then entered notice of motion for dis-

Stoddert & Mason v. Waters & Griffith.

solution on the docket, and ten days having expired since the entry, he now moved the Court to dissolve the injunction.

The bar generally stated the construction of the rule to have been that there must be ten days' notice before term, or if the notice be given in term, a term's notice is required.

The COURT (*nem. con.*) said it was the construction which had always been given to the rule.

Mr. Jones then moved to have the rule amended.

But the COURT declined, thinking the construction of the rule reasonable.

CIRCUIT COURT OF THE UNITED STATES.

JULY TERM, 1808, AT ALEXANDRIA.

WELLFORD *v.* MILLER.

This Court will not grant a commission, in a civil action at common law, to take the deposition of a witness residing in Virginia within one hundred miles of the place of trial, because he may be summoned to attend personally.

UPON affidavit that witnesses resided in Fredericksburg, (less than one hundred miles from Alexandria) —

Mr. Youngs, and *Mr. Jones*, for the plaintiff, moved for a commission to Virginia, to take the depositions of those witnesses to be used as well in a suit in chancery, as at common law depending in this Court. The chancery suit was at issue and a general *dedimus* had been awarded.

The COURT (DUCKETT, J., absent,) suffered the commission to issue in the chancery suit, considering it as in aid of the general commission heretofore awarded. But refused it in the common-law case, because the witnesses (residing within one hundred miles) might be summoned to attend this Court personally.

The law of Virginia of 29th November, 1792, § 13, p. 279, was cited by *Mr. Youngs*, which allows a commission to issue when the witness resides beyond sea, or in a foreign country, or in any other of the United States.

UNITED STATES *v.* SLACUM.

The Act of Congress of the 30th of April, 1790, § 32, which limits the prosecution of offences not capital to two years, applies to cases of assault and battery at common law in the District of Columbia.

The finding of an informal presentment is not the finding or instituting of the indictment, so as to take the case out of the statute.

INDICTMENT for assault and battery. The defendant pleaded the Act of Congress of April, 1790, [1 Stat. at Large, 112,] by which prosecutions are limited to two years, after the offence committed.

United States v. Faw.

Replication that a presentment was found for the offence within the two years. General demurrer.

Mr. Swann, for the defendant. The words of the act are, "Nor shall any person be prosecuted, tried, or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid."

The Supreme Court of the United States, in the case of *Adams v. Wood*, 2 Cranch, 336, decided that the statute was a bar to all kinds of prosecution and for offences created by acts of Congress since 1790.

Mr. Jones, Attorney for the United States for the District of Columbia, contended, that the Act of Congress applies only to offences created by acts of Congress, not to cases of assault and battery at common law. At the time of passing the Act of Limitation, there were no crimes against the United States, but statutory crimes.

Instituting an indictment, is as appropriate as finding an indictment. The presentment was the institution of the indictment. A presentment is tantamount to an indictment. An indictment is only a specification of a presentment. Instituted is a broader term than found.

Mr. Swann, in reply. The general acts of Congress apply to this district, unless repugnant to the adopted laws of Virginia. Assault and battery is included in the Act of Congress, and is within the reason of the cases mentioned in the act.

If an informal presentment of a grand jury may be said to be the institution of an indictment, the act might be completely evaded.

The COURT (DUCKETT, J., absent,) was of opinion that the Act of Congress applied to cases of assault and battery; that the finding of a previous presentment was not the finding nor institution of the indictment; that the Act of Congress was a good bar to the prosecution; and that therefore the replication was bad.

UNITED STATES v. FAW.

A justice of the peace cannot discharge a prisoner who has been committed for trial on a charge of felony; nor can he take money in lieu of bail. But he is not liable for so discharging the prisoner, unless he did it contemptuously and wilfully, and with evil intent.

INDICTMENT for misdemeanor in office of justice of the peace in

United States v. Faw.

taking the personal recognizance of Harry Allen, in the sum of one hundred dollars, charged with theft of goods to the amount of sixty dollars, and receiving one hundred dollars in cash in lieu of bail or security.

Mr. E. J. Lee and *Mr. C. Lee*, for the defendant, contended that the justice acted judicially, and that it was an error in judgment for which he is not liable to answer criminally, and that he has a right to take the money; and cited *Cro. Car.* 446.

Mr. Jones, United States Attorney, contended that it is not necessary to show a corrupt motive, but that the defendant is liable for gross ignorance. He acted ministerially, and if it be a palpably illegal act, he is punishable.

Mr. E. J. Lee, for the defendant. A justice of the peace is not liable unless he acts from corrupt motives. *Rex v. Jackson et al.*, 1 T. R. 653. He has a right to bail after commitment, and to discharge without *habeas corpus*.

Mr. C. Lee prayed the Court to instruct the jury that if they should be satisfied by the evidence, that the defendant acted uprightly and without corrupt motives, he ought to be acquitted, and so unless they should be satisfied by the evidence that he did it contemptuously.

Mr. Jones, contra. The defendant had no right to discharge at all after commitment; and no authority to take money as a deposit in lieu of bail for a person charged with felony.

The COURT (DUCKETT, J., absent,) said they had no doubt on those points. The justice of peace cannot discharge after commitment for trial, nor can he take money in lieu of bail.

The COURT (DUCKETT, J., absent,) instructed the jury that unless they should be satisfied that the acts were done contemptuously, wilfully, and with an evil intent, they ought not to find the defendant guilty. (The words wilfully and contemptuously were used in the indictment.)

The jury found a special verdict, that Faw acted illegally, in taking the money in lieu of bail, and in discharging the traverser from imprisonment; but he thus acted through ignorance and mistake of the law, and without any sinister or corrupt motive.

Judgment for the traverser on the verdict. DUCKETT, J., absent.

UNITED STATES v. FAW.

A constable having a warrant to arrest a man for assault and battery, has a right to break open the door of the offender's dwelling-house to arrest him.

INDICTMENT for not doing all in his power to prevent a riot, whereby a man was killed.

Hodgson v. Butts.

Mr. Jones, for the United States, prayed the Court to instruct the jury, that neither the constable nor the magistrate had a right to break open the door of the house inhabited by a man, to arrest him upon a warrant for an assault and battery,

Which the COURT refused. DUCKETT, J., absent.

The jury found the defendant not guilty.

HODGSON v. BUTTS.

The purchaser of a vessel, who has paid the expenses and disbursements of a previous voyage upon the order of the master, cannot recover them from the master, although he paid them under a mistaken expectation that he was to be reimbursed out of the freight.

ASSUMPSIT to recover the expenses and disbursements of the schooner *Mississippi*, which the plaintiff (who was the owner, by virtue of an absolute bill of sale made by R. & J. Hamilton to him, after the end of the voyage,) had paid on the orders of the defendant, who had been master of the schooner during the voyage, and who had received the freight, and applied it according to the directions of the former owners, R. & J. Hamilton.

Mr. Jones, for the defendant, prayed the Court to instruct the jury, in effect, that the defendant was not liable, although the plaintiff had paid those expenses and disbursements, under a mistaken expectation that he was to be reimbursed out of the freight which the vessel had earned, whether he paid them before or after he obtained possession of the vessel.

The defendant, the master, was not liable to the seamen for their wages, unless he had shipped them, and had personally made agreement with them. But if he had paid them, he would have a lien on the vessel therefor, which would have followed the vessel into the hands of the plaintiff, so that he could not have obtained a clear title until he had refunded them. *Abbott on Shipping*, 106.

Mr. Swann and *Mr. E. J. Lee*, for the plaintiff, prayed the Court to instruct the jury, in effect, that if the plaintiff was not the owner of the vessel, and the orders were drawn up on the personal credit of the defendant; or, if at the time of drawing it was understood by the plaintiff and defendant, that the plaintiff was to be reimbursed out of the freight already earned, the defendant is liable.

The COURT, (DUCKETT, J., absent,) gave the instruction prayed by *Mr. Jones*, and refused to give that prayed by *Mr. Swann* and *Mr. Lee*, because the evidence did not justify an inference by the

Welch v. Mandeville & Jamesson.

jury, that the plaintiff was not the owner of the vessel at the time of paying the defendant's drafts, nor that the orders were drawn on the personal credit of the defendant; nor that there was any understanding by the plaintiff and defendant that the plaintiff was to be reimbursed out of the freight.

Verdict for the defendant. The plaintiff took a bill of exceptions, but did not prosecute a writ of error.

WELCH v. MANDEVILLE & JAMESSON.

The legal plaintiff has a right to dismiss a suit brought in his name, by order of a person who claims to be his assignee of the right of action, and the Court will not interfere to protect the assignee, unless the evidence of the assignment is clear.

THIS was an action of covenant in the name of James Welch, the plaintiff, but for the use, and by the order of Allen Prior, against Mandeville & Jamesson, upon a contract for the sale of land to them by Welch. At the second term after an office judgment had been entered against Welch at the rules, the defendant Mandeville, who alone had been taken, produced to the clerk a release under the seal of Welch, and an order from him to dismiss the suit, whereupon the clerk made an entry upon the minutes of the Court, that the action was dismissed by agreement of the parties. Afterwards, at the same term, the attorney who brought the suit in the name of Welch, moved the Court to reinstate it, and grounded his motion upon his own affidavit, and the papers mentioned therein. The affidavit stated, that in the autumn of 1799, Prior brought to the attorney three bills of exchange, drawn by Welch upon Mandeville & Jamesson for 2500 dollars each, and an account in the handwriting of Mandeville, acknowledging a balance due to Welch on the 31st of January, 1798, of 8707-dollars and nine cents, to be paid in the times and manner therein stated. Prior, at the same time, stated that Welch was indebted to him and that he had taken those bills in payment, which Mandeville and Jamesson refused to accept, saying that Welch had deceived him in the sale of the lands. Prior left the papers with his attorney, and requested him to take the best measures to obtain the money from Mandeville & Jamesson; whereupon he brought two suits in the County Court of Fairfax, in Virginia, the one was a suit at law in the name of Welch, against Mandeville & Jamesson, founded upon their acknowledgment of the balance of account. The other was a chancery attachment in the name of Prior, against Welch as an absent debtor, and charging Mandeville & Jamesson as garnishees.

Upon the trial of the suit at law, the defendants produced the original contract respecting the sale of the land, whereupon the attorney for Welch suffered a nonsuit, and having obtained an office copy of the contract, brought the present suit thereon, for the use of Prior, in the name of Welch, but without his directions, which was known to Mandeville. There had been no decision in the chancery attachment. The attorney never had any communication with Welch upon the subject of this suit; but he had reason to believe that Welch knew of the suits in Fairfax county, and did not interfere with them. The attorney corresponded solely with Prior on the subject of this suit, who had directed the application of the money when recovered. That the attorney did not know of the release and order to dismiss the suit until after the entry was made on the minutes, and that the suit had been dismissed without his consent or that of Prior, who had been at all the expense of the suit. That he had been informed that Welch was in the prison-bounds, and that when Prior put the papers into his hands, he informed him that it was his only prospect of receiving payment of the debt due to him by Welch.

Whereupon the defendant, Mandeville, produced the affidavit of Welch, stating that he drew the bills in favor of Prior merely for him to get them accepted, and negotiate them for account of Welch and as his agent. That Prior never gave value for them, and instead of being the creditor of Welch, was his debtor; and that he (Welch) never made a transfer or assignment of the contract with Mandeville & Jamesson to Prior, or any other person.

The defendant, Mandeville, also produced a paper purporting to be the answer of Welch, to the chancery attachment in Fairfax county, (but which had not then been filed in the suit,) which contained the substance of his affidavit, and also a letter written by Welch to Mandeville & Jamesson, and sent by Prior at the time he presented the bills, corroborating the fact that Prior was only his agent in that business.

In this state of the case the court below continued the motion to reinstate the cause until the next term, to give an opportunity to Prior to produce evidence of an assignment of the contract and of his right to bring suit upon it; at which term he produced his own affidavit, stating that Welch was indebted to him upwards of 14,000 dollars, and that Welch gave him the three drafts on Mandeville & Jamesson, for his (Prior's) own use and benefit, for and on account of a tract of land sold to Welch, and which Welch sold to another person. He produced also certain other documents tending to corroborate his affidavit.

But the Court refused to reinstate the cause, and ordered it to be dismissed according to the agreement of the parties to which

refusal, Allen Prior took a bill of exceptions, which the Court signed.

Mr. E. J. Lee, for Allen Prior, cited the following authorities, viz., *Corser v. Craig*, in the Circuit Court of Pennsylvania, by Judge Washington; *Ex parte Byas*, 1 Atk. 124; *Atkin v. Barwick*, 1 Str. 165, 166; *Ex parte Oursell*, Amb. 297; *Yeates v. Groves*, 1 Ves. Jr. 280; *Anchor v. Bank of England*, Doug. 635; *McCullom v. Coxe*, 1 Dal. 139; *Fitzgerald v. Caldwell*, 2 Dal. 215; *Gibson & Johnson v. Minet & Feetor*, 1 H. Bl. 602; *Chitty on Bills*, 1, 2; *Winch v. Keely*, 1 T. R. 619; *Young v. Welling*, 2 Dal. 276; *Row v. Dawson*, 1 Vez. 331.

Affirmed by the Supreme Court of the United States, 7 Cranch, 152.

REID, IRVIN, & Co. v. W. HODGSON.

The person in whose favor a letter of guaranty is given, may be examined as a witness for the plaintiff; his declarations, therefore, cannot be given in evidence. It is not necessary that the handwriting of a party should be proved by a person who has seen him write.

A deposition taken but not used by the plaintiff, cannot be read in evidence by the defendant, if the testimony would not have been competent for the defendant, if it had been taken on his part.

ASSUMPSIT upon the defendant's letter of guaranty for £10,000 sterling for Sanderson & Rumney.

Mr. C. Simms, and *Mr. Taylor*, for the plaintiffs, offered to read a copy of a letter, dated 11th August, 1799, from Sanderson & Rumney, to the plaintiffs, acknowledging a balance of £10,000 sterling to be due from them to the plaintiff.

The defendant proved that Rumney, the writer of the letter, resided with his family in the Genesee country, in the State of New York.

The COURT (DUCKETT, J., absent,) refused to permit the copy of the letter to be read in evidence, because Rumney might have been examined as a witness for the plaintiffs; and even if he should have refused to be examined on account of interest, yet he would have been a competent witness if he had waived the objection.

To prove the handwriting of the plaintiffs to certain letters, the defendant produced James Sanderson, who had lived as clerk with Sanderson & Rumney, and who testified that there was a large and long correspondence between that house and the plaintiffs, and that he had seen a great number of letters received from the plaintiffs by Sanderson & Rumney, in the course of that correspondence, and in answer to letters of Sanderson & Rum-

ney, addressed to the plaintiffs, and that the letters now produced, appear to be in the handwriting of some one of that house. Robert Young also testified that he had corresponded with the plaintiffs, and had put money into their hands, and had drawn the money from them, and that the letters now produced were, as he believed, in the same handwriting with those. But neither of the witnesses had ever seen either of the plaintiffs write.

The COURT (DUCKETT, J., absent,) said the letters were sufficiently proved to go in evidence to the jury. It is evidence by comparison of hands, and is the best evidence the nature of the case will admit. To say that the handwriting must be proved by a person who had seen him write, is only to say that a fact known to one person cannot be proved by him, because there may be a person who has a more correct knowledge of the same fact, or whose judgment may be more mature, or may have had a better opportunity of getting information. It may happen that a witness may have seen the party once write his name, but his testimony would not be so satisfactory as that offered in this case.

A deposition of Robert Perry was taken on the part of the defendant, but not used or read by him; it being filed, the plaintiffs wished to read it, but it being testimony which would not have been competent for the plaintiffs to have used, if taken on his part, the Court decided, that the mere fact of the deposition being taken on the part of the defendant, did not make the testimony competent evidence for the plaintiffs. *Nonsuit.*

WILSON'S ADMINISTRATOR v. TURBERVILLE'S EXECUTORS.

In actions against executors and administrators, the statute of limitations may be pleaded after office judgment.

THIS cause having been referred, but no issue made up, and the award having been set aside at the last term, and the cause standing on an office judgment and writ of inquiry, —

Mr. Swann, for the defendant, moved to plead the statute of limitations, which

Mr. E. J. Lee, for the plaintiff, opposed, and produced the will of Turberville, by which he orders all his just debts to be paid, and contended that that would be a good bar to the plea of the statute, and that the court would not suffer a nugatory plea to be pleaded.

But the COURT (DUCKETT, J., absent,) admitted the plea, it being in a case of executors, and referred to the case of *Dean v. Flannery & Wife*, Executors of Turner, at November term, 1807, where the plea was admitted after office judgment.

LEONARD & THOMAS COOKE v. NEALE.

If the testimony of the subscribing witness cannot be had, evidence may be given of his handwriting, and of that of the maker of the instrument; and it is not necessary that the jury should be satisfied by the evidence, of the handwriting of the subscribing witness, if they are satisfied as to that of the maker.

Property distrained for rent, may be transferred by the tenant to his creditors, subject to the lien for the rent.

TROVER for certain goods. John Withers being indebted to the plaintiffs, Leonard & Thomas Cooke, and also intending to indemnify them against their suretyship, in a replevin bond given to release the same property from distress for rent due to L. Summers, it having been seized by Neale as bailiff of Summers, by a writing not under seal, mortgaged to them the property in the hands of Neale. The possession of the property remained with Neale after the release of it by execution of the replevy bond. A few minutes after the release of the property from the distress, a creditor took his *fiery facias* against the goods of Withers, and put it into the hands of the said Neale, who was a constable, and he levied it upon the goods in his hands.

On the day after the *fiery facias* was laid, the plaintiffs demanded of Neale the possession of the goods, which he refused to give; whereupon the plaintiffs brought their action of trover. On the trial, the plaintiffs proved that it was not in their power to obtain the testimony of the subscribing witness, John Pierson, and offered to prove his handwriting, and that of Withers, the maker of the instrument.

The COURT suffered them to give such evidence.

Mr. E. J. Lee, for the plaintiffs, then prayed the Court to instruct the jury that if they should not, by the evidence, be satisfied of the handwriting of Pierson, they ought to disregard the evidence of the handwriting of Withers.

Which instruction the COURT refused to give. It not being a sealed instrument, the Court thought that the strongest evidence of the signature of Withers, was, not proof of the handwriting of the witness, but of the handwriting of Withers himself, notwithstanding the case of *Barnes v. Trompowsky*, 7 T. R. 265, and *Adam v. Kers*, 1 Bos. & Pul. 360.

The defendant's counsel, Mr. Taylor, then prayed the Court to instruct, &c., that the plaintiffs, not having had the possession of the goods, cannot recover in this suit, against the claim of the creditor in whose name the *fiery facias* was issued. Upon this question,

The COURT (DUCKETT, J., absent,) was divided. FITZHUGH, J., thinking that upon the bargain being made, Neale was a trustee

for the plaintiffs, and that his possession is to be considered as theirs.

CRANCH, C. J., rather inclined to think that such a constructive possession cannot be set up against a creditor. That Neale's possession is to be considered as the possession of Withers, and not of the plaintiffs.

But upon a second argument, (DUCKETT, J., being present,) the COURT (*nem. con.*) refused to give the instruction prayed by the defendant's counsel, thinking that Neale's possession after the goods were relieved from the distress, was as a trustee for the plaintiffs.

FITZHUGH, J., delivered the following opinion:

The constable, after the distress, held the goods, subject to being restored to Withers on his replevying them. The replevy bond was given before the execution against Withers was delivered to the constable. Before the replevy bond was given, and as a collateral security for the plaintiffs' becoming jointly bound in it, Withers agreed by a written instrument to assign and transfer to them the goods distrained. This was a complete transfer of Withers's right; he could not countermand it. The constable, who never had more than a right to hold the property for the purpose of securing the payment of the rent, must have held it as trustee for the plaintiffs. He could not hold it in trust for Summers, the landlord, because by law he had no lien on it. Withers was estopped by the writing in question. The creditors had no claim to it, because it was restored, or ought by law to have been restored as soon as the replevy bond was given, and their executions were not delivered to the constable until this was done. The constable was not then the agent of the creditors, nor authorized to take this property for their benefit, and cannot be said to hold for their use. He must have held in trust for the plaintiffs. The question is not between Summers and the plaintiffs; he had the first lien, but he is satisfied by the plaintiffs' securing his rent. As between the plaintiffs and those creditors, the plaintiffs have a prior and better right; they are creditors for an adequate consideration, and Withers, who was under a moral obligation to pay them, and under no legal or equitable impediment, (at least on the part of the defendant, or these creditors by judgment,) transfers the property distrained, to the plaintiffs. They ought not to be deprived of the advantage which they have gained over other creditors, by viewing the constable as holding this property for the purpose of satisfying the distress, and therefore considering it as in custody of the law. When it was replevied, this presumption of law ceased. The object of its detention being then answered, it ought to have been released and delivered

Harper v. Smith.

up to the person entitled to it. Who was entitled to it? Not Withers, because he had transferred it; not the constable, because he never had more than a fiduciary interest, viz., for the sole purpose of securing the payment. On his taking the replevy bond, it was *functus officio*, and his interest ceased. It could not vest in the judgment creditors whose executions had not been shown or delivered, but the property must have been in the plaintiffs, and the possession of the constable, in contemplation of law, their possession. *Lampriere v. Pasley*, 2 T. R. 485.

In *Atkin v. Barwick*, 1 Str. 165, it was decided that a delivery to A, to the use of B, on a precedent consideration, is not countermandable by A, but vests the absolute property. In the case cited, the goods, to wit, a parcel of silk, were delivered in the absence of B, to his use, without his knowledge, or the actual delivery to B. In an action by assignees of the bankrupt, the late owner of the goods, it was insisted that they did not pass, because B had not accepted them; that though the delivery was stated to be to B's use, yet it did not appear to be in satisfaction of a precedent debt. There was therefore no consideration, and it was a fraud on creditors. But it was decided that this passed the absolute property, subject to a disagreement by B; but the contract is not open till agreement, but complete, unless there is a disagreement, and being for B's benefit, his disagreement shall not be presumed, and Eyre, J., said, "all these cases go on the distinction, where the delivery is with and without consideration; if with consideration, and the delivery is of money, debt lies; if of goods, trover. The precedent debt is a sufficient consideration, and it vests before notice; for it being to his benefit, a disagreement shall not be presumed." Fortescue, J. "Property by our law may be divested without an actual delivery, as a horse sold in a stable. But it is otherwise by the civil law. A general bailment alters no property, but this is not such."

HARPER v. SMITH.

The principal obligor in a bond is a competent witness for the surety.

The Court will not give an instruction upon a point not material to the issue.

An averment that the usurious contract was made in November, is supported by evidence that it was made in September. The variance is not material.

DEBT on a joint and several bond, executed by Douglas as principal, and Smith as surety. The action against each obligor was several.

Mr. Taylor, for the defendant, offered Douglas as a witness in

Dixon v. Ramsay.

this action against Smith, and cited *Abrahams v. Bunn*, 4 Burr. 2251; *Smith v. Prager*, 7 T. R. 60; *Jordaine v. Lashbrooke*, 7 T. R. 601; *Lockhart v. Graham*, 1 Str. 35.

Mr. Swann, for the plaintiff, objected, because he swears to discharge himself; for if Harper recovers against Smith, Smith may recover upon motion against Douglas, with the costs of this action.

Mr. E. J. Lee, in reply, cited *Peake*, L. E. 93, 128, 129; *Carter v. Pierce*, 1 T. R. 163, and *Bent v. Baker*, 3 T. R. 27.

The COURT, (*nem. con.*) admitted *Mr. Douglas* to be sworn.

The plea was usury, and

Mr. Swann, for the plaintiff, contended that the contract as laid in the plea being that J. & D. Douglas should give their bond, and the bond on oyer being a bond signed "J. & D. Douglas," with only one seal, and the names subscribed by James Douglas only, the evidence did not support the plea. The usurious contract must be strictly proved. *Carlisle v. Trears*, Cowp. 671.

The COURT, (DUCKETT, J., *contra*,) refused to instruct the jury that the bond produced on oyer was not the bond of J. & D. Douglas, because they supposed the question not material to the issue. The averment in the plea was, in substance, that the bond in the declaration mentioned was executed in pursuance of the corrupt agreement, and the description of the bond, calling it the bond of J. & D. Douglas, was not necessary to be proved, the proof being that the bond in the declaration mentioned was given in execution of the corrupt agreement.

The allegation in the plea was, that the corrupt agreement was made on the day of November, and the evidence was, that the terms of the agreement were concluded in September.

The COURT (*nem. con.*) said the variance was not material.

DIXON'S ADMINISTRATOR v. RAMSAY'S EXECUTOR.

The proceeds of sales of lands made under a will to pay debts are equitable assets.

ASSUMPSIT. *Plene administravit*, and issue.

Mr. Taylor, for the defendant, contended that, on the plea of *plene administravit*, the plaintiff could not give evidence of lands ordered by the will to be sold by the executor to pay debts, and sold accordingly. They are only assets in equity, and to be distributed *pari passu*.

Mr. C. Lee, for the plaintiff. Money received for lands sold by executors, under a will devising them to be sold by executors to

Welsh v. Lindo.

pay debts, is assets at law and not in equity. *Burwell v. Conant*, Hardres, 405.

Mr. Taylor, in reply. The case in Hardres is not now law. Courts have leaned to the other side, and rather consider them equitable than legal assets. If equitable they cannot be given in evidence in a suit at law. 6 Bac. Ab. 537, tit. Executors, H, Gwillim's note; Toller's Law of Executors, 328; *Newton v. Bennett*, 1 Bro. C. C. 135; *Silk v. Prime*, 1 Bro. C. C. 138; 2 Fonb. Eq. B. 4, part 2, ch. 2, § 1, note *d*; Harg. Co. Lit. 113, note 2; *Freemoult v. Dedire*, 1 P. Wms. 430; *Batson v. Lindegreen*, 2 Bro. C. C. 94; *Prowse v. Abington*, 1 Atk. 484.

Mr. C. Lee, *contrà*. On *plene administravit* the defendant must show that he has fully administered equitable as well as legal assets. The plaintiff is a simple contract creditor; if he had been a specialty creditor it might possibly be otherwise. The cases are contradictory. Toller, 331. *Blatch et al. v. Wilder et al.* 1 Atk. 420.

The COURT (*nem. con.*) was of opinion that the money arising from the sale of the land was equitable and not legal assets, and that the defendant was only bound to account for legal assets in this case.

 WELSH v. LINDO.

In an action against an indorser of a promissory note, a record of a judgment upon the same note between other parties cannot be given in evidence, unless the note itself be produced, and the defendant's indorsement proved.

ASSUMPSIT against the defendant as indorser of a promissory note made by Kerchival to Lindo, who assigned it to Welsh, "without recourse," who assigned it to Hodgsett.

Mr. E. J. Lee, for the plaintiff, offered no evidence but a transcript of a record of a suit between Hodgsett and Kerchival, upon the note described in the declaration, in which suit the defendant pleaded payment to Lindo, and obtained a verdict on that issue.

Mr. Swann objected — That the record was not evidence in this cause, unless the plaintiff satisfied the jury, by other evidence, that the defendant assigned the note to the plaintiff. The note should be produced, and the handwriting of the defendant proved.

Mr. E. J. Lee, *contrà*. The note is filed in the court of Woodford county in Kentucky, at a greater distance than one hundred miles. The plaintiff cannot have a *subpœna duces tecum*. He cannot obtain the note. Hodgsett and Welsh both claimed under Lindo.

Dunlop & Wilson v. Alexander's Adm'r.

A verdict is evidence, if it concern the same point, though not between the same parties. It is the best evidence in the power of the plaintiff.

Mr. Swann, in reply. Upon application to the court in Kentucky, it is probable they would have suffered the original note to be taken out. Nothing appears to the contrary. Until the assignment of Lindo is proved, it does not appear that Lindo was privy to Welsh, or to either of the other parties.

The COURT (DUCKETT, J., absent,) instructed the jury that the record is not evidence until the assignment from Lindo to the plaintiff be first proved otherwise than by the record.

A juror was withdrawn by consent, and the cause continued at the costs of the plaintiff.

DUNLOP & WILSON v. ALEXANDER'S ADMINISTRATOR.

The statute of limitations is not a bar to a British debt contracted before the treaty of peace.

Rule for settling interest accounts.

THIS was an action for a British debt contracted before 1775, for goods sold to the defendant's intestate by a British factor; the balance was agreed in 1784, and acknowledged often afterwards as a just debt.

The counsel agreed that the statute of limitations might be given in evidence on *non assumpsit*, if it could avail if pleaded specially.

Mr. E. J. Lee, for the plaintiff. The statute of limitations is one of the legal impediments to the recovery of debts, which were removed by the treaty of peace, and the convention of 1802. *Hopkirk v. Bell*, 3 Cranch, 454, and 4 Cranch, 164, *et seq.*

The COURT was of opinion, under the authority of the two cases of *Hopkirk v. Bell*, in February term, 1806, and 1807, 3 Cranch, 454, and 4 Cranch, 164, that the statute of limitations is no bar; it being a legal impediment removed by the treaty of peace and the convention of 1802.

The Court said that the correct way of settling interest accounts, is, in case the payment is equal to, or exceeds the interest, to add interest to principal up to the time of the payment, and deduct the payment from the sum of interest and principal; but if the payment does not equal or exceed the interest, the payment is not to be deducted till the time of settlement.

THOMAS SHREVE v. BENJAMIN DULANY.

Notice to produce a book of accounts given on the preceding evening, is sufficient when the counting-house of the party is very near the court-house.

The defendant is not liable for goods delivered to his wife upon her credit after a separate maintenance allowed by him; but from the defendant's express promise to pay, the jury may infer that the goods were delivered to his wife by his order, unless such inference is rebutted by proof that the original credit was given to her.

ASSUMPSIT for goods sold and delivered to the defendant's wife.

The defendant, after the jury was sworn, gave a written notice to the plaintiff to produce his book of original entries, in which the items of the account were charged; and the next day moved the Court to compel the production of it.

Mr. E. J. Lee, for the plaintiff, objected that the notice was too short.

But the COURT thought it was reasonable notice; the plaintiff's counting-house being within a very short distance from the court-house.

Upon the trial, the plaintiff offered evidence to prove that the goods were furnished and delivered to the defendant's wife at her request; and that the defendant afterwards verbally promised to pay for them. That when the goods were furnished to the defendant's wife, the plaintiff had an account opened in his books against her; and she stated that a considerable part of the goods were for the use of the defendant's sons, who were under age, (except William,) and were applied to their use and were made into clothes for them, for the making of which the defendant had paid.

Whereupon the defendant offered evidence that his wife left his house in the year 1804, and had lived separate and apart from him ever since; that this was known to the plaintiff at the time he delivered to her the goods, and that in 1805 the defendant, by deed, allowed his wife a separate maintenance.

Whereupon the defendant, by his counsel, *Mr. C. Simms*, prayed the Court to instruct the jury, that if they should be satisfied by the evidence that the defendant's wife left his house, and lived separate and apart from him, and that this was known to the plaintiff at the time he furnished her with goods, and that the defendant had made a competent separate maintenance for his wife before the goods were so furnished, then they ought to find for the defendant. In support of this prayer he cited the following authorities: 1 Esp. N. P. 122, 125; 1 Powell on Contracts, 78; Buller, N. P. 135.

Mr. E. J. Lee, *contra*, cited *Stedman v. Gooch*, 1 Esp. Rep. 6; Esp. N. P. 124, 126.

United States v. Browning.

The COURT refused to give the instruction as prayed, but instructed the jury that, if the goods mentioned in the declaration were delivered to the defendant's wife, on her credit, after the separation between them, and after the settlement of a separate maintenance by the defendant on his said wife, then the defendant is not liable for the same. But if the jury should find that the defendant expressly assumed to pay the amount of the account after the goods were delivered to his said wife, that then his express promise to pay, (if uncontradicted by proof of the credit being originally given to his said wife,) is evidence, from which the jury have a right to infer that they were delivered by his order, in which case he would be liable to the present action.

UNITED STATES v. BROWNING.

In Alexandria county, a *certiorari*, in a case of forcible entry and detainer, may be issued by one judge in vacation.

The inquisition may be traversed. No pleas will be allowed but a traverse of the force; or a possession for three years.

Restitution will not be awarded unless some person be held out of possession who has a right to possession. The Act of Virginia does not punish the force, it only provides for restitution.

THIS was a *certiorari* to bring up the proceedings had before a justice of the peace in a case of forcible entry and detainer, upon a warrant issued under the Act of Virginia of the 3d of December, 1792, p. 151, which reduces into one the several acts concerning forcible entries and detainers. The *certiorari* was granted by the chief judge of this court, upon the petition and affidavit of the defendant, in vacation. The petition was addressed to the chief judge, and his order was in these words — "Let the *certiorari* issue as prayed, upon bond being given according to law, in the penalty of two hundred dollars." (See the Act of Virginia of 12th of December, 1792, reducing into one, the several acts concerning the establishment, jurisdiction, and powers of the District Courts, §§ 45 and 49, p. 81; and the Act of Congress of 3d March, 1801, § 3, [2 Stat. at Large, 115,] which gives this court, sitting in Alexandria, the same powers and jurisdiction, civil and criminal, as were then possessed and exercised by the District Courts of Virginia.)

Upon the return of the *certiorari*, it appeared that the jury had found an inquisition of forcible entry and detainer, to which the defendant, by *Mr. Youngs*, his attorney, had offered two pleas in writing.

1st. That restitution ought not to be made to Stephen Cooke, at whose instance the warrant had been issued, because on the 6th

of January, 1807, he had, in writing demised the premises for a term of seven years to Hammond, who took possession and assigned his term to Morris who took possession; and that afterwards Browning, by permission of Morris, took possession, which he now holds; and this he is ready to verify, and prays judgment whether the said Cooke has right of entry or possession, in manner and form as he claims the same.

2d. That restitution ought not to be made, because the said Cooke, on the day of May, 1808, distrained and took away the goods, &c., to be dealt with according to law, to satisfy the rent-arrear, and prays judgment whether the said Cooke has right to his warrant of forcible entry and detainer, &c.

These pleas were objected to by *Mr. C. Simms*, in behalf of Cooke, and the justice refused to receive them. They were again offered to this Court.

Mr. Taylor, for the prosecution, objected, and contended that the defendant could not, after inquisition found, traverse the force. 1 Hawk. c. 64, § 17, 25, 26, 27; Id. c. 64, § 8. Nor can the title be put in issue. It is a question of possession only. 1 Hawk. c. 64, § 38.

But if the defendant can now traverse the force, he can plead nothing else, unless it be a possession for the space of three years, according to the 7th section of the Act of Virginia.

Mr. Youngs, *contrà*, contended that as Cooke had demised the premises for a term which was unexpired, he had no right of entry, there being no clause of reëntury for non-payment of rent. *Gordon v. Harper*, 7 T. R. 9. That if he had no right of entry, he could not claim restitution against one holding by permission of the lessee; and that by the Statute of Virginia, of the 12th of December, 1792, § 40, p. 80, the defendant had a right to plead as many several matters as he should think necessary for his defence.

The COURT, however, rejected the pleas, and confined the defendant to the general plea, "not guilty in manner and form, as stated in the inquisition."

Mr. Youngs and *Mr. Swann*, for the defendant.

Mr. Taylor and *Mr. Simms*, for the United States.

The COURT (*nem. con.*) on the prayer of the defendant's counsel, instructed the jury that, if they should be satisfied by the evidence, that the traverser was, at the time of the said force, in possession of the said land, under the said Morris, and by virtue of the lease aforesaid, and did not hold the said possession adversely to the said Morris nor to the said Hammond, the jury ought to find the issue for the defendant.

The grounds of the opinion were that the holding must be a

holding of some person out of a possession. Some person must be put out of possession; but according to the supposed case, Cooke had no right to possession. Browning's possession was Hammond's possession, and Hammond's possession was Cooke's possession during the term. The Act of Assembly does not punish the force; it only provides for the restitution; but restitution cannot be made to a man not put out of possession, and not entitled to possession. If the Court would not award restitution, the jury ought not to find the defendant guilty; that is, under the construction of the Act of Assembly, the defendant cannot be guilty of unlawful force, unless in a case where restitution ought to be made.

The jury, not being able to agree, were discharged by consent. But at November term, 1809, the jury found the defendant guilty of the force as charged in the inquisition.

PHILIPS v. JANNEY.

It is not sufficient notice to the defendant of the dishonor of a bill payable in London to inclose the bill and protest in a letter to the defendant in this country, and put the letter into the mail of a British packet, in time of war between England and France, without following it by a duplicate protest, &c., in reasonable time; the original protest not having been received.

ASSUMPSIT by the indorsee against the indorser of a foreign bill of exchange, payable in London, for two hundred pounds sterling, accepted by the drawees, and protested for non-payment. The bill, and protest were inclosed in a letter from the plaintiff to the defendant, giving notice of the demand and non-payment, dated November 5th, 1803, addressed to the defendant in Alexandria, and put in the mail for the British packet, which sailed from England on the 16th of November, 1803, which was the first packet for the United States after the protest, and which arrived safely at New York, of which arrival the plaintiff had notice. There was then war between England and France. The usual mode of conveyance was by these packets, which sailed once a month for some port of the United States, where the foreign letters were to be put into the mail of the United States, for particular transmission to their respective places of address; or by some private ship regularly trading to Alexandria. The plaintiff offered evidence that the most regular mercantile houses usually preferred the conveyance by packet, notwithstanding the war. That it is usual for foreign merchants to send duplicates of protests to their correspondents and sometimes triplicates, before

Janney v. Baggot.

they hear of the receipt of any of them, but not after hearing of the arrival of the ship which carried the original protest.

It appeared that the original protest was never received by the defendant; but in December, 1805, or beginning of 1806, he was informed of the protest by the plaintiff's agent; and on the 4th of December, 1806, was informed of the dishonor of the bill, by another letter from the plaintiff, dated September 3d, 1806, which inclosed a copy of the protest, and the second bill of the same set. That the drawer of the bill died insolvent, in August, 1805, but was in good credit when he drew the bill, and if the bill and protest which was sent in November, 1803, had been duly received by the defendant, the drawer might have paid the bill or secured payment of it. The defendant refused to pay the bill. The prior indorsers are still solvent, and received notice of the dishonor of the bill from the defendant immediately after he received the duplicate protest in 1806.

Upon this state of facts the plaintiff's counsel, *Mr. C. Lee*, prayed the Court to instruct the jury, that the defendant was liable to pay the amount of the bill; contending that the plaintiff used due and reasonable diligence in giving notice to the defendant.

Mr. Swann, for the defendant, contended that there should have been actual notice in reasonable time; that the plaintiff ought to have continued to send duplicates, &c., till the receipt of some one of them was acknowledged; and that a neutral vessel would have been a safer conveyance than a British packet in time of war.

The COURT (*nem. con.*) refused to give the instruction. A bill of exceptions was taken; but a writ of error was never prosecuted.

JANNEY v. BAGGOT.

An account in bar or set-off, must be filed one term before trial.

ASSUMPSIT for goods sold and delivered.

At the trial the defendant offered to prove an account in set-off. The plaintiff objected, and relied on the rule of the Court at last term, that no account shall be given in evidence as a set-off, unless it be filed one term before trial.

The defendant proved that a few days ago, the account had been presented to the plaintiff, who acknowledged it to be just and that it ought to be set off. But the Court adhered to the rule. If the defendant had filed it at the last term, the plaintiff might have then dismissed his suit and prevented the costs of this term.

REZIN OFFUTT v. W. J. HALL.

If a person who is not party to a promissory note, indorses his name upon it in blank, with intent to give it credit, the plaintiff may write over it an engagement to pay it in case of the insolvency of the maker.

Ability to pay part of his debts, is not evidence of a debtor's insolvency.

Such indorser may insist on the usual demand and notice.

A count upon a promise to pay the debt of another in a certain event, must aver a consideration.

An averment that the defendant put his name on the back of a note with intent to give it a credit, and to induce the plaintiff to accept the same, and that the note so indorsed, was delivered to the plaintiff for a full and valuable consideration, is a sufficient averment of a consideration for the promise.

Insolvency of the maker, in Virginia, dispenses with suit and demand and notice.

ASSUMPSIT on a note for \$625.95, drawn by Henderson & Company, payable to the plaintiff or order, and the name of the defendant written on the back of it.

The plaintiff's attorney had filled up the blank indorsement, in this manner, viz. :

"In case the within Alexander Henderson & Company, should fail to pay the within-mentioned sum when it becomes due, and should then be insolvent, I then promise to pay the same to the within-mentioned Rezin Offutt. William James Hall."

Mr. Swann, for the plaintiff, contended that if he satisfied the jury that the note was indorsed by Hall to give a credit to Henderson & Company with the plaintiff for the amount of the note, then he had a right to fill up the indorsement as he had done, and to recover in this action. *Russell v. Langstaffe*, Doug. 514; *Chitty on Bills*, 117; *Jordan v. Neilson*, 2 Wash. 164.

Mr. E. J. Lee, contra. The plaintiff had no right to fill it up. If anybody had, it was Henderson & Company, for whose benefit it was indorsed. But no one had a right to fill it up. No principle of the common law justifies it. *Russell v. Langstaffe* was upon the custom of merchants; but this note is not within that custom. In *Jordan v. Neilson*, there was a written authority to fill the blank. If it is any thing, it is an agreement to pay the debt of another, and the whole agreement ought to be in writing, according to the statute of frauds. It was no promise until it was filled up. No consideration is stated in the indorsement; the consideration forms a part of the agreement. *Wain v. Warlters*, 5 East, 10.

CRANCH, C. J. Is the word "promise" in the English statute? The words used in the Act of Assembly are, "promise or agreement."

Mr. E. J. Lee. There must be a good and valuable consideration moving from the plaintiff to the defendant. There must be a

benefit to the defendant, or the plaintiff must have parted with some right or property on the credit of the defendant. 2 Bl. Com. 445; 1 Fonb. 331, 332; *Rann v. Hughes*, 7 T. R. 350.

Evidence was offered by the plaintiff to prove that upon bargaining with Henderson & Company for his tobacco, they offered him their note, payable to himself, without an indorser; that he refused to accept it; when they brought the note again with the defendant's name indorsed upon it.

The COURT instructed the jury, that if they should be satisfied by the evidence that the note was indorsed by the defendant under the circumstances stated, and for the purpose of giving a credit to Henderson & Company, and to induce the plaintiff to sell his tobacco to Henderson & Company, the defendant is liable to the plaintiff upon such indorsement; but that it was necessary for the plaintiff to prove that the payment of the note was demanded from Henderson & Company, when due, and that reasonable notice of the non-payment was given to the defendant.

Mr. E. J. Lee then prayed, but the COURT refused to instruct the jury that if, when the note became due, viz., 18th January, 1804, Henderson & Company had property sufficient to pay this note, and did pay debts to the amount of \$14,375.95, and continued to pay their debts until the month of March, 1804, the plaintiff cannot sustain this action.

Bill of exceptions taken by the defendant.

On prayer of *Mr. Lee*, the COURT instructed the jury that if they should be satisfied by the evidence that the note would have been paid by Henderson & Company, if it had been regularly demanded, and that it was not so demanded, they ought to find for the defendant.

The jury could not agree. But there was a verdict for the plaintiff at November term, 1808, on the three first counts, and for the defendant on the fourth count, and the defendant moved in arrest of judgment. See *post*.

THE COMMON COUNCIL OF ALEXANDRIA v. BROCKETT.

Citizens of Alexandria are not competent jurors in an action of debt for the penalty of a by-law of the corporation, but are competent witnesses.

A by-law, approved on the 27th of March, will not support an averment of a by-law passed on the 26th.

DEBT for the penalty of a by-law of the corporation of Alexandria, against burning oyster-shells on a brickkiln, without a license.

Mr. E. J. Lee, for the defendant, objected to the jurors, because they were citizens of Alexandria, and the penalty enured to the benefit of the corporation; and cited *Hanson v. Peirce*, 1 Morgan's Essays, 280; *Rex v. Carpenter*, 2 Shower, 47; *City of London v. Unfree Merchants*, 2 Shower, 146; 3 Bac. Ab. 252, tit. Juries E.; Co. Lit. 154, 156, 157, 158 (a); *Mellar v. Spateman*, 1 Saunders, 344.

Mr. Swann, *contra*, observed that in the case from Morgan's Essays, the litigation was between the corporation and a stranger, but here it is between the town and one of its citizens.

The COURT overruled the objection, and also an objection by the defendant to the admission of J. Mandeville, a citizen of Alexandria, as a witness for the plaintiffs. 1 Lofft's Gilbert's Evidence, 240; *Rex v. Mayor and Company of London*, 2 Lev. 231; Bull. N. P. 290; Trials per Pais, 385.

The jury found a verdict for the plaintiffs, subject to the opinion of the Court, upon the competency of George Deneale and Joseph Mandeville, two of the citizens of Alexandria, as witnesses for the plaintiffs.

The COURT, upon consideration, granted a *venire facias de novo*, upon the ground of the incompetency of citizens of the town as jurors; but were of opinion that they were competent as witnesses.

The COURT also (DUCKETT, J., absent,) refused to suffer a by-law, approved by the mayor of Alexandria on the 27th of March, to go in evidence to support the averment of a by-law passed on the 26th, which was the day on which it was passed by the common council.

CREASE v. NEGRO PARKER.

Money advanced to a slave to enable him to purchase his freedom, cannot be recovered of him after his emancipation, although he acknowledge the debt after suit brought.

THIS cause was tried at November term, 1807, [*ante*, 448,] when a special verdict was found. It was an action brought against a free negro for money lent to him while a slave, to enable him to purchase his freedom.

The verdict was in these words: — "We of the jury find that the sum stated in the declaration was, previous to the defendant's emancipation from slavery, advanced by plaintiff to defendant who was then a slave, and who was manumitted in due form of law on the 30th of March, 1803. The said money was so advanced for the purpose of enabling defendant to purchase his

Pentleton v. Forbes.

freedom, and defendant did, in the month of November, 1806, subsequent to the commencement of this suit, acknowledge to a certain James Harris, that he, the defendant, was indebted to the plaintiff in the sum of £24, and would be able to pay it by the time a judgment was rendered against him. Therefore we find for the plaintiff \$84 $\frac{80}{100}$ damages, should the law be in his favor. Should it not, we find for the defendant."

The case was argued by *Mr. Youngs*, for the plaintiff, who cited *Esp. N. P.* 163; and by

Mr. H. Herbert and *Mr. Swann*, for the defendant, who cited *Co. Lit.* 118, 119 (b); *Law of Virginia* of 17th December, 1792, § 36, p. 191; *Esp. N. P.* 158, and 2 *Esp. Cases*, 628.

The COURT gave judgment for the defendant upon the special verdict.

CRANCH, C. J., was of opinion that the judgment could not be given for the plaintiff on this verdict, but was rather inclined to think that there ought to be a *venire de novo*, as the jury had found an acknowledgment which would be evidence of an express promise.

 PENTLETON v. FORBES.

A judge who takes a deposition under the Act of Congress, must certify that the witness was cautioned and sworn to testify the whole truth, and that notice was given to the adverse party, or the reason why it was not given.

DEBT by the plaintiff as assignee of a promissory note made by the defendant.

Mr. Youngs, for the defendant, offered to read a deposition which had been taken under the Act of Congress, without notice, before Judge Parker, in Virginia, who certified that it was written by himself, and subscribed and sworn to by the deponent, and that the deponent resided more than one hundred miles from the county of Alexandria, and District of Columbia.

The judge did not state any reason for not giving notice to the plaintiff, nor that the deponent was cautioned and sworn to speak the whole truth, nor the reason of taking the deposition, nor the distance of the place of caption.

The COURT (*DUCKETT*, J., absent,) rejected the deposition, because the judge had not certified that the witness was cautioned and sworn to testify the whole truth; nor whether the plaintiff was notified of the time and place of caption; nor the precise place of caption. (It was said to be in Westmoreland county, Virginia.) Nor did he certify the place of residence of the plaintiff or his agent.

JOHN WELSH v. ABRAHAM LINDO.

A former recovery may be given in evidence upon *nil debet*.

A former recovery upon a count for goods sold and delivered, may be given in evidence in an action of debt upon a promissory note, with an evidence that judgment was confessed in the former action upon and for the note now declared upon.

DEBT on a promissory note for \$382.47. The defendant pleaded *nil debet*.

Mr. Swann and Mr. Jones for the defendant, offered in evidence under the plea of *nil debet*, a record of Frederick county, Virginia, of a judgment upon a declaration for \$10,000 for goods, wares, and merchandises sold and delivered, upon which judgment was confessed for £739 13s. and offered parol evidence to prove that the judgment was upon and for this note and another.

Mr. C. Simms and Mr. E. J. Lee, for the plaintiff, objected that it ought to have been pleaded; that it cannot be for the same cause of action. Goods sold and delivered, and a promissory note are different causes of action, and cannot be averred to be the same. *Rook v. Sheriff of Salisbury*, 12 Mod. 412; *Bredon, qui tam, v. Harman*, 1 Str. 701; 4 Bac. Ab. 114, Pleas and Pleading, I. 113.

The COURT (DUCKETT, J., absent,) was of opinion that the former recovery may be given in evidence on *nil debet*, and that parol evidence may be given to show, that although the action was *indebitatus assumpsit* for goods sold and delivered, the judgment was really confessed for and upon the notes, and that this parol evidence was not contradictory to the record.

The plaintiff became nonsuit, with leave to move to reinstate.

PAYEN v. HODGSON.

After a plea of misnomer in abatement, the Court will not suffer the record to be amended, but upon payment of costs, and a discharge of the bail.

THE written order for issuing the writ, was to issue it in the name of Thomas Payson, but by mistake of the clerk, it issued in the name of Thomas Payen. The written order was filed in the clerk's office. The defendant had given bail, and pleaded a misnomer in abatement.

Mr. Taylor, for the plaintiff, moved for leave to amend; which the COURT refused, unless upon payment of costs and discharging the bail.

DUCKETT, J., absent.

MANDEVILLE v. JAMESSON.

Upon the petition of a creditor of an insolvent debtor to deprive him of the benefit of the insolvent act, the defendant may show that the petitioner is not his creditor.

THIS was a petition to deprive the defendant of the benefit of the insolvent law, filed under the seventh section, upon an allegation that the defendant had given a preference to one of his creditors in a deed to La Mar; in trust to pay a debt due Margaret Jamesson in Ireland.

Mr. Jones, for the defendant. Upon the insolvency of the defendant, this property was all given up to his trustee. If the deed be void, there was no preference given. An abortive attempt to give a preference is not within the meaning of the law. The words are, "assigned or conveyed any part of his property to give a preference to any creditor or creditors;" "or of having given any preference as aforesaid." [2 Stat. at Large, 239.] There must be a disposition, or lessening of his property. A conveyance means a legal and valid conveyance, whereby the property passes.

CRANCH, C. J., suggested a doubt whether the defendant should be permitted to go into proof that the petitioner is not a creditor, supposing it to be a matter to be decided *ex parte* at the time of the insolvent's application, and that *primâ facie* evidence is sufficient.

The COURT, however, (DUCKETT, J., absent,) went into an examination of the evidence, and was of opinion that the petitioner was a creditor, and that the deed was made with intent to give a preference.

But the COURT, by the consent of the parties, continued the cause to the next term.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1808, AT ALEXANDRIA.

THE UNITED STATES *v.* HODGKIN.

Upon a recognizance for the appearance of the defendant in a case of misdemeanor, he is bound to appear on the first day of the term.

Mr. E. J. Lee contended that the recognizance, returnable to this term, cannot be forfeited at this term, as the traverser has the whole term to appear in. The return-day of all writs is the day after the last day of the session.

The COURT (DUCKETT, J., absent,) said the traverser is bound to appear at the Court, which is the first day of the term, and the whole term is but one day in law.

UNITED STATES *v.* BENJAMIN DULANY.

When a presentment for a misdemeanor is found by the grand jury without the name of a prosecutor, the Court will order an indictment to be sent up without the indorsement of a prosecutor, upon the suggestion of the Attorney of the United States.

ON motion of *Mr. Jones*, the Attorney for the District, to send up an indictment to the grand jury upon a presentment made by them, no person being indorsed as prosecutor,—

The COURT (DUCKETT, J., absent,) said that in such cases, upon the motion of the Attorney for the United States, they would order indictments to be sent up without a prosecutor's name being indorsed, upon the attorney's suggesting that in his opinion the cases require such interposition.

Mr. Jones replied that he could not undertake to give any opinion, but he should never make a motion in any case which should appear to him to be malicious or trifling.

UNITED STATES v. WILLIS.

Playing at any game, even for money, is not of itself an offence at common law. The offence is created by statute, and can only be punished as the statute directs.

Mr. Taylor, for the defendant, moved to quash the indictment, which was at common law, for assembling to the number of ten or more, and playing at "snap and rattle," or "in and out," to the corruption of the public morals, and to the common nuisance of all the good citizens of the county of Alexandria.

Private vices are not indictable. 4 Bl. Com. 41. To play at any game is no crime at common law, even to play for money; therefore there can be no offence unless it be attended with such circumstances as would in themselves amount to a riot, or a nuisance, or to actual breach of the peace without the playing. 4 Bl. Com. 171. All the penalties under the English law are statutory. If it were unlawful to play for money, no recovery for money won could be had at common law, yet such actions may be sustained, and the defendant even holden to bail. 2 Bac. Ab. 619, Gaming, A; 11 Co. 87 (b). And the statutes of England only prohibited playing to a certain amount.

The Act of Virginia of the 8th of December, 1792, § 5, p. 175, which creates the offence, declares how it shall be punished, viz. by fine of 20 dollars upon conviction before a justice of the peace.

Mr. Jones, for the United States, admitted that he had no precedent for the indictment in all its parts, but contended that it is good as an indictment as a nuisance. It is sufficient to charge it to be to the nuisance of the citizens of the county of Alexandria. It is not necessary that it should be charged as a nuisance to all the citizens of the United States.

He admitted that gaming is not *per se* indictable at common law. The Virginia law shows that gaming is a pernicious vice and a public evil. Every kind of public gaming is therefore unlawful; every unlawful act is not an indictable offence, but every unlawful act done in a public manner and tending to corrupt the general morals of the community is a misdemeanor at common law. He admitted that private vices are not punishable at common law. But public lewdness, bawdy-houses, eaves-droppers, *communis rixatrix*, and the like, are indictable misdemeanors.

Gaming in England is lawful, yet the keeping of a common gaming-house is indictable at common law, because it is injurious to society.

The statute of Virginia punishes all gaming at a public place, but does not describe particularly the offence charged in this indictment. The punishment ought to be proportioned to the of-

fence, but the statute punishes all alike by a fine of 20 dollars. If the statute declares a punishment of a common-law offence, and contains no negative words, you may still indict and punish at common law. It has been so decided in this Court.

The COURT stopped the counsel on the other side who were about to reply, being of opinion that the indictment is not good at common law. The statute has created the offence and the punishment. (FITZHUGH, J., *contrà*.)

WILSON'S ADMINISTRATOR v. TURBERVILLE'S EXECUTOR.

A clause in a will directing all the testator's debts to be paid, and appropriating the rents of his real estate, does not take the case at law out of the statute of limitations, when the plaintiff does not seek his remedy under the will.

SPECIAL ASSUMPSIT by defendant's testator to sell all his crops for several years at a certain price; breach, that he did not sell and deliver, &c.

Pleas, *non assumpsit* and limitations.

To rebut the plea of limitations, *Mr. E. J. Lee*, for the plaintiff, produced a copy of the will of the defendant's testator, in which he directs all his just debts to be paid, and directs that the rents of his real estate shall be applied, in case certain parts of his personal estate should not be sufficient; and contended that this clause of the will took the case out of the statute. *Jones v. Strafford*, 3 P. Wms. 89; *Gofton v. Mill*, 2 Vern. 141; *Andrews v. Brown*, Prec. in Chan. 385; *Anon.* 1 Salk. 155; *Catling v. Skoulding*, 6 T. R. 193; *Truman v. Fenton*, Cowper, 548.

Mr. Swann, contrà. If the plaintiff claimed under the will, the cases might apply; but if he will avail himself of that clause of the will he must confine himself to the provision made by the will. All the cases are in chancery. No case where at law such a will takes it out of the statute.

If the plaintiff in a suit at law could avail himself of this equitable evidence, he might perhaps gain a priority which would exclude other creditors who have as good a right in equity as himself.

The COURT (*nem. con.*) directed the jury that that clause of the will was not an acknowledgment of the cause of action.

CRANCH, C. J., suggested that there was a difference between a debt liquidated and a claim for uncertain damages upon a breach of such a contract as this. Upon this ground, as well as upon those urged by *Mr. Swann*, the Court founded its opinion; but told the plaintiff's counsel that they would hear any cases which

Wray v. Reily.

he might cite upon a motion for a new trial if the verdict should be against his client upon the plea of limitations.

WRAY v. REILY.

A discharge of a debtor under the Maryland Insolvent Act of 3d January, 1800, is a bar to an action for a debt contracted in Georgia, although the creditor always resided in South Carolina.

DEBT upon a judgment of the Circuit Court of the United States for the District of Georgia, obtained in April, 1796.

Among other pleas, the defendant pleaded a discharge under the Insolvent Law of Maryland, passed on the 3d of January, 1800, setting forth all the proceedings, and the final discharge by the chancellor.

By the 5th section the debtor is to be "discharged from all debts, covenants, contracts, promises, and agreements, due from, or owing, or contracted by him before the date of his deed of assignment," upon his complying with the terms of the act. To this plea the plaintiff replied that on the 2d of December, 1793, the plaintiff dwelt in South Carolina, and the defendant in the State of Georgia, where he made his promissory note, upon which the plaintiff recovered judgment, upon which this action is brought. That the cause of action therefore arose in Georgia. That the plaintiff never resided in Maryland, and took no benefit from the surrender of the defendant's effects in that State.

To this replication the plaintiff demurred.

Mr. E. J. Lee, for the defendant, contended that the discharge of a debtor, upon a fair surrender of all his effects according to the laws of the country of his domicile is, by the comity of nations, good all over the world. That the act of the chancellor is the judgment of a court of competent jurisdiction, and everywhere conclusive; as in the cases of marriage and divorce. That this Court ought to decide upon the validity of this discharge in the same manner as a court of Maryland would decide; and cited the following authorities: *Hunter v. Potts*, 4 T. R. 192; *Hughes v. Cornelius*, T. Raym. 473; *James v. Allen*, 1 Dal. 188; *Miller v. Hall*, 1 Dal. 229; *Thompson v. Young*, Id. 294; *Gorgerat v. McCarty*, Id. 366; *Emery v. Greenough*, 3 Dal. 370; *Cooke's B. L.* 34; *Cooper's B. L. addenda*, 10, 27, 28; *Sill v. Worswick*, 1 H. Bl. 665; *Phillips v. Hunter*, 2 H. Bl. 402; *Davis v. Marshall*, in this Court, at Washington, July term, 1804. [*ante*, 173.]

Mr. Swann, *contrà*, admitted that contracts may be discharged by the laws of the country wherein they were made; but con-

Potts v. Findlay, Bannatine, & Company.

tended that they could not by the laws of any other country; and cited Cooper's B. L. 361, tit. *Cessio bonorum*; *Smith v. Buchannan*, 1 East, 6; 1 Dal. 188, 229, 294, 366; 2 Dal. 100, 256; 3 Dal. 369; *Pedder v. McMaster*, 8 T. R. 609; *Vanrough v. Van Arsdaln*, 3 Caines's N. Y. Term Rep. 154; *Davis et al. v. Marshall*, in this Court, July term, 1804. [*ante*, 173.]

CRANCH, C. J., did not sit in this cause.

FITZHUGH, J., delivered the opinion of the Court, that the plea of discharge under the Insolvent Act of Maryland, was a good bar to the action.

WELLFORD v. MILLER.

A copy will not be received as oyer, when a *profert* has been made of the original. And if a copy is offered, the defendant may demur.

DEBT on a bond, with *profert* of the original bond. The defendant demanded oyer, and the plaintiff produced a supposed copy only, it being said that the original was in the possession of the defendant; whereupon the defendant demurred because the *profert* was of the original, and the oyer was of a supposed copy.

Mr. C. Lee, for the defendant, cited *Thoresby v. Sparrow*, 1 Wils. 16; *Smith v. Woodward*, 4 East, 587.

Mr. Youngs, *contrà*. The plaintiff could not have declared upon it as a bond lost or mislaid, and when he drew the declaration he supposed that the defendant would be compelled to produce it, so as to enable him to give oyer. *Read v. Brookman*, 3 T. R. 151. In *Darlington v. Groverman*, this Court compelled the defendant to receive a copy as oyer.

FITZHUGH, J. That was under the Act of Assembly of Virginia, the bond being filed in another court.

The COURT stopped *Mr. Lee* in reply, and adjudged the demurrer to be good. The fact that the bond was in the defendant's possession did not appear upon the record.

POTTS v. FINDLAY, BANNATINE, & COMPANY.

When bills are drawn upon the consignee, on a shipment of tobacco, he has no right to hold up the tobacco after the time of payment of the bills, without orders, but should sell to meet the payment of the bills.

THIS was a suit in Chancery under the Act of Virginia of December 26, 1792, c. 78, p. 115. The bill claimed the price of a

cargo of tobacco, for which the defendants might have sold it, but did not, and kept it on a falling market, after notice and acceptance of bills drawn by the plaintiff upon the shipment.

The answer of the defendants denied fraud and negligence, and averred that they acted *bonâ fide*, and according to their best judgment.

Mr. C. Lee, for the plaintiff, contended that, although the plaintiff had not expressly ordered the defendants to sell immediately, yet, as the bills were drawn upon the shipment, at sixty days' sight, it was the duty of the defendants to sell so as to meet the bills at maturity; and that it might be inferred from the plaintiff's letters that such was his intention. There was evidence that the defendants had sold the tobacco of others at a good price, while they held up that of the plaintiff until the price had fallen. Marshall, 206; Beawes, Lex Merc. 45, 48.

Mr. Swann, contra. The defendants acted with good faith. It was their interest to sell for the best price. There is no evidence that they could have sold the plaintiff's tobacco for a better price. They had a discretion. They had no positive orders to sell at any time. The drawing of the bills by the plaintiff would have been an excuse for selling, but was not an order to sell at all events.

The plaintiff claims unliquidated damages. That is not such a debt as will give jurisdiction in a chancery attachment, under the Act of Assembly of Virginia of 26th December, 1792, c. 78, p. 115.

Mr. E. J. Lee, in reply. The Act of Assembly does not give jurisdiction, it only regulates the mode of proceeding. The remedy is not confined to liquidated debts. The Act of Assembly gives it in all cases of suit in equity for relief against absent defendants. In cases where absent debtors have property within the jurisdiction of the Court, it has cognizance of the cause under its general equity jurisdiction. 1 Atk. 19. If a case is doubtful, or the remedy at law difficult, the court of equity will not pronounce against its jurisdiction. *Weymouth v. Boyer*, 1 Ves. Jr. 424.

Mr. Swann, in support of his objection to the jurisdiction of the Court, cited *Thornton v. Spotswood*, 1 Wash. 142.

The COURT was of opinion that the defendants were not justified in holding up the tobacco after the time of payment of the bills drawn by the plaintiff; and directed an issue to ascertain the prices at which the tobacco might have been sold on the day of payment.

SMALLWOOD v. VIOLET.

Records certified under the seals of the respective State courts are admitted, under the agreement of the bar, without other authentication.
An execution is not the best evidence of a judgment.

THIS was an action upon a judgment of J. Franklin, a justice of the peace of Charles county, in Maryland.

Mr. W. D. Simms, for the plaintiff, offered in evidence a paper purporting to be an execution issued by J. Franklin, against the defendant, and in favor of the plaintiff, upon which there was a certificate of the clerk of Charles county, that J. Franklin was a justice of the peace.

Mr. E. J. Lee, for the defendant, objected that the commission of the justice should be produced.

But the COURT (CRANCH, C. J., absent,) reminded him of the agreement of the members of the bar of the 17th July, 1807, "that copies of records of any State court should be received in evidence if certified and authenticated in such manner as would make them evidence in the courts of the State from whence they are brought;" and overruled the objection.

Mr. Lee, then objected, that the execution is not the proper evidence of the judgment; and that a copy of the judgment ought to be produced.

And the COURT, being of that opinion, the plaintiff became nonsuit.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1808, AT WASHINGTON.

UNITED STATES *v.* DANIEL MCPHERSON.

Peremptory challenge not allowed in cases of larceny.

INDICTMENT for stealing, under the Act of Congress of April 30th, 1790, § 16, [1 Stat. at Large, 116.]

It was conceded by *Mr. Morsell*, for the prisoner, that he had not a right to peremptory challenge.

CRANCH, C. J., and DUCKETT, J., were of opinion, but did not deliver it, that the prisoner was not entitled to a peremptory challenge.

In the case of *United States v. Carrigo*, at Alexandria, in January, 1802, [*ante*, 49,] it was refused by the Court. Upon examining W. Cranch's notes in Washington, he could find no case in which it had been allowed in Washington. It has been lately allowed in Alexandria, by the assent of the Attorney for the United States. It was never allowed in Mr. Mason's time.

UNITED STATES *v.* MICHAEL MULLANY.

Free-born negroes, not subject to any term of servitude by law, are competent witnesses in all cases. Color alone is no objection to a witness.

INDICTMENT for assault and battery. The defendant was a white man.

CRANCH, C. J., delivered the opinion of the Court.

Several free-born negroes and mulattoes are offered as witnesses to support the prosecution. The counsel for the traverser have objected, and contend that they are not competent witnesses, being disqualified by the Act of Assembly of Maryland, (1717, c. 13,) by which it is enacted "That no negro or mulatto slave, free negro, or mulatto born of a white woman, during his time of servitude by law, or any Indian slave, or free Indian, native of

this or the neighboring provinces, be admitted and received as good and valid evidence in law, in any matter or thing whatsoever, depending before any court of record, wherein any Christian white person is concerned." It is contended that the words "during his time of servitude by law," are applicable only to the "mulatto born of a white woman," and not to the "free negro." So that a free negro, whether under an obligation of servitude or not, is wholly incapacitated to become a witness in any case wherein a Christian white person is concerned. On the other side it is contended that the free negro, at all times except "during his time of servitude by law," is a competent witness in such a case.

In order to support the traverser's construction of the statute, much reliance is placed on the word "his." It is said that if the legislature meant to apply the expression respecting servitude by law, to the free negro as well as to the mulatto, they would have said "during their time of servitude by law." The word "his," it is said, in grammatical construction, must apply to the last person antecedent, namely, the mulatto, and cannot comprehend both the mulatto and the free negro.

This construction, it is also said, derives support from the third section of the act, in which it is provided that "where other sufficient evidence is wanting against any negro or mulatto slaves, free negro, or mulatto born of a white woman, during their servitude by law, the testimony of any negro or mulatto slave, free negro, mulatto born of a white woman, or Indian," &c., "may be received as evidence, provided it do not extend to the depriving them, or any of them, of life or member." It is said that the legislature having used the pronoun in the plural number in the third section, and in the singular in the second, it is evident, they meant in the one case to refer only to the mulatto, and in the other to both mulatto and free negro.

It was also said to be an absurdity in terms, to speak of the time of servitude of a free negro. That the expression, "during his time of servitude by law," was peculiarly applicable to the mulatto born of a white woman, because such mulatto, by the act 1715, c. 44, § 27, was declared to be a servant until the age of thirty-one years; but that the expression was not applicable to the free negro, because there was no servitude by law imposed upon him.

The argument drawn from the circumstance that the pronoun personal is used in the singular number, is not considered of much weight, because the words "free negro" and "mulatto," are joined by the conjunction disjunctive "or"; and in such case the idiom of the English language admits the use of the singular pro-

noun as applicable to each member of the sentence so joined. In such a sentence, the word *his* may have the same force and effect, as the word *their*; and it is evident that in this very act, the legislature have used the words indiscriminately to the same effect.

If the words of a statute be doubtful, and if recourse be had to construction, the first inquiry is, what was the evil which the legislature intended to remedy? In the present case, we are not left to conjecture upon that point; for the legislature in the preamble to the statute have expressly declared the evil for which they contemplated a remedy. They say, "Whereas it may be of very dangerous consequence to admit and allow as evidences in law, in any of the courts of record," "any negro, or mulatto slave, or free negro, or mulatto born of a white woman, during their servitude, appointed by law, or any Indian," &c. The evil complained of, is not the admission of free negroes and mulattoes as witnesses generally, and in all circumstances, but only "during their servitude, appointed by law." Here the meaning of the legislature cannot be misunderstood; the words *their* servitude must mean the servitude of the free negro, as well as that of the mulatto; they cannot be confined to the case of the mulatto, without charging the legislature with the grossest grammatical blunder. It is evident that the legislature contemplated some case in which a free negro could be subject to servitude by law; and by turning to the act of 1715, c. 44, (the same act which declares the mulatto born of a white woman to be subject to servitude,) we find a number of cases in which a free negro may be subjected to servitude by law. Thus in sect. 4, a free negro harboring a servant, or slave, forfeits one thousand pounds of tobacco, and if unable to pay, he is to make satisfaction by servitude. By sect. 6, a free person, taken up on suspicion of being a runaway, and unable to pay the reward of two hundred pounds of tobacco, shall make satisfaction by servitude. By sect. 7, a runaway, if not a slave, is to reimburse the county by servitude. By sect. 19, a runaway shall satisfy the reward by service, when free. By sect. 20, if such person be free and unable to pay the reward, he may be committed to prison until he give security, or make satisfaction by servitude or otherwise. By sect. 27, a free negro, the begetter of a child on a white woman, shall become a servant for seven years. By sect. 30, a free man, the father of a bastard begotten of a female servant, shall satisfy the damage by servitude or otherwise. So by the act of 1715, c. 26, § 2. A free person convicted of stealing, shall pay fourfold, and if unable to pay, shall satisfy by servitude. And by sect. 7, the fees of criminals may be paid by servitude.

These are some of the cases in which by the laws prior to 1717,

a free negro might be subjected to temporary servitude by law. They are enough to show that the expression, "during his time of servitude by law," might with as much propriety be applied to the free negro as to the mulatto, and that his case was within the same reason. Why should the legislature limit the disability of the mulatto to his time of servitude, and not that of the free negro also? or why permit a free-born mulatto to be a witness, and reject the free-born negro? We can see no reason for such a whimsical distinction, and the legislature cannot be presumed to have had an intention to make it, unless such intention be very clearly expressed.

The legislature, when in the third section they say "free negro, or mulatto born of a white woman, during their servitude by law," evidently mean the same thing as they had before expressed by the same words in the preamble, and by the words "free negro, or mulatto born of a white woman, during his time of servitude by law," in the second section. It was argued that by the third section, the legislature meant to exclude free negroes, as witnesses even on the trial of a slave, in cases which might affect his life or member, and *a fortiori*, on the trial of a Christian white person.

By this section, slaves and free negroes and mulattoes, under all circumstances, that is, as well during their time of servitude by law, as otherwise, are admissible witnesses on the trial of a slave, in a case not affecting life or member. But how can it follow from thence, that on the trial of a slave in a case affecting life or member, a free negro or mulatto, not under servitude, would be excluded?

Before the act of 1717, there was no law which excluded free negroes from being witnesses; that act only imposes a disability upon them during their servitude by law. It was the condition of servitude that the legislature justly supposed ought to render them incompetent witnesses; for the same reason that slaves are incompetent. It was probably supposed that while under the control of a master, they might by means of fear or threats of ill treatment, or actual ill treatment, be induced to conceal the truth, and that it was not safe to trust to their testimony. That reason could justify their exclusion only while their state of servitude continued.

This construction of the act seems to have been adopted by the legislature in 1796, c. 67, § 5, when they declared that no manumitted slave should be entitled to give evidence against any white person; for if all free negroes were already excluded by law, such a provision respecting those who were free by manumission, was unnecessary.

United States v. Peggy Hill.

For these reasons, I am clearly of opinion, that free-born negroes, not in a state of servitude by law, are competent witnesses in all cases, or rather that color alone does not disqualify a witness in any case. At the time of the argument, I supposed the question had been decided by this court. But upon a careful examination of my own notes, and those of the late chief judge, I do not find any such case.

In the case of the *United States v. Barton*, a free mulatto, in Washington, July term, 1803, [*ante*, 132,] two manumitted negroes were admitted as witnesses against him, on an indictment for stealing.

In the case of *United States v. Nancy Swann*, [*ante*, 148,] (a free mulatto,) a summons for a slave to testify for the defendant, was refused by the Court; the Court being inclined to the opinion that the slave was not a competent witness. But in *United States v. Shorter*, a free black, at December term, 1806, [*ante*, 371,] a slave was admitted as a witness for the traverser. These are all the cases respecting the admission of people of color as witnesses, of which I can find any notes. But see the case of *United States v. Fisher*, at July term, 1805, [*ante*, 244.] Fisher, a white man, was indicted for beating his wife. Lucy Butler, a free-born black woman, was admitted by the Court as a witness against him.

NOTE. The Court was full when the question was argued, but when this opinion was delivered, DUCKETT, J., was absent, and FITZHUGH, J., having some doubt, it was agreed to hear a motion for a new trial, upon the ground of admitting improper evidence. The verdict being against the defendant, the question was further considered upon the motion for a new trial in this case, and in that of *Susan Davis v. Swann*, at this term, when the other judges gave their full assent to the above opinion.¹

THE UNITED STATES v. PEGGY HILL.

A slave is not a competent witness against a free-born mulatto not subject to any term of servitude by law.

INDICTMENT for stealing a gold watch. The defendant was

¹ The following is written by Judge Fitzhugh, in his note-book, in p. 84. After stating the opinion in this cause at length, as above, —

“The Court intimated that they would hear a motion for a new trial — on the argument of which A. B. D. attended, and the Court were unanimously satisfied with the opinion expressed in this cause.”

Hance v. McCormick.

a free-born mulatto, not subject to any term of servitude by law.

Mr. Jones, for the United States, offered *Charity*, a slave, as a witness against the prisoner. See *United States v. Mullany*, [*ante*, 529.] In the case of *United States v. Negress Terry*, at June term, 1806, [*ante*, 318,] at Washington, and in the case of *United States v. Shorter*, at December term, 1806, [*ante*, 371,] a slave was admitted as a witness for free negroes.

But the COURT (DUCKETT, J., absent,) having more fully considered the Acts of Assembly of 1717, c. 13, and 1751, c. 14, § 4, were of opinion that a slave is not a competent witness against a free-born mulatto, not under a state of temporary servitude. It is also clear, that the slave cannot be admitted under the third section of the act of 1717. It cannot be implied, from the exclusion (in the second section) of slaves as witnesses against a white person, that they may be admitted against a free person of color; for the principles of the civil law, and of the laws of every country where slavery is tolerated, exclude them as witnesses against a free person.

Mr. Hiort, for the prisoner. Verdict, not guilty.

HANCE v. JAMES McCORMICK, JR.

The possession of the tobacco notes, is evidence of the possession of the tobacco which they represent.

If a cause be postponed for two or three days, witnesses attending from Baltimore will be allowed pay for those days.

TROVER for seven hogsheads of tobacco.

The plaintiff had put the tobacco notes into the hands of *Mr. Heigh*, for sale, who lost them; they came to the hands of the defendant. These tobacco notes were certificates given by the public inspector and keeper of the public warehouse; that *A. B.* has a hogshead of tobacco, of such a weight and quality, in the public warehouse, to be delivered to the bearer of the certificate.

Mr. Law, for the defendant, contended that there was no evidence that the tobacco was in the defendant's possession, although he had the notes, and sold the tobacco to *Mr. Levy*, who received and sold the same.

But the COURT overruled the objection. Witnesses living in Baltimore were allowed for attendance, although the Court postponed the civil cases for two or three days.

NEGRO NAN and Children v. D. MOXLEY *et al.*

The affidavit of a manumitted negro, is sufficient ground for an order to issue a summons returnable immediately upon a petition for freedom.

PETITION for freedom. Affidavit of negro Charles, a manumitted negro, that his wife Nan (the petitioner) was about to be removed out of the district.

The COURT (FITZHUGH, J., absent,) allowed a subpoena, returnable immediately, to answer the petition just filed by *Mr. F. S. Key*.

JONES & PASSMORE v. HENRY KNOWLES.

The Court will not permit a party to prove other fraudulent transactions of the other party with strangers, and not connected with the present case, in order to fortify a charge of fraud and collusion in this case.

The magistrate who takes a deposition under the Act of Congress must certify all the facts necessary to make it evidence under the statute.

ASSUMPSIT on a promissory note for 1500 dollars made by the defendant to Eber Hale, dated March 19th, 1805, payable to Eber Hale on the 7th of September, 1805, who indorsed the note in this form, viz.:—

“Baltimore, September 7, 1805. The within note I assign to Jones & Passmore for such part of it as will be security for them for five hundred and fifty-six dollars and eighty-six cents, which Mr. Henry Knowles will pay if not paid by me in sixty days. Eb. Hale.”

There were counts for goods sold and delivered, and for goods sold and delivered to Hale at the request of the defendant, and defendant's promise to pay.

Mr. F. S. Key, for the plaintiff, offered to examine a witness to prove that Hale had, after the date of the receipt, viz. in September, 1805, offered to pass other notes of the defendant in Alexandria; that the defendant did not, before those notes became due, deny the notes, when shown to him; but when payable, produced receipts in bar, and to prove that Hale was in the habit of purchasing goods with Knowles's notes. This testimony was offered as evidence of a fraudulent collusion between Knowles and Hale in the present case.

But the COURT (FITZHUGH, J., absent,) refused to admit it, saying that no man could come prepared to meet evidence and charges respecting every transaction of his life, without notice.

Thornton and White v. Caldwell.

Mr. Jones then offered the deposition of Eber Hale, taken under the Act of Congress before the mayor of Hartford.

Mr. Morsell objected that the witness was interested; he only assigned five hundred dollars, part of the notes to the plaintiffs. If they can recover the whole they are trustees for Hale for the balance. Parol evidence cannot be received of P. being mayor of Hartford. The mayor does not state that he was not of counsel for one of the parties; has not certified the reasons of taking the deposition, and does not state the residence of the witness, nor of the parties. The mayor was not competent to certify a release from the plaintiffs to the witness, nor a copy of the release. The original ought to be produced.

Mr. Jones, contra. Parol evidence is competent to prove A B to be mayor. If the mayor was of counsel for the plaintiffs, the defendant must show it. It appears by his certificate that the witness was in Hartford, and that appears to be the reason of the taking the deposition.

Hale in the deposition itself states that he has no interest in the note. He stands indifferent between the parties. If the plaintiffs recover against Knowles, Knowles may recover against Hale upon his receipt. The copy of the release certified by the mayor, is sufficient. It is competent for the plaintiffs to prove that Hartford is more than one hundred miles from Washington, and that the witness lives in Hartford, and that the defendant lives in Georgetown.

The original release belongs to the witness. It is not in the power of the plaintiffs to produce it. The witness is not obliged to produce it.

The Mayor acted judicially, and was competent to judge whether it was a release, and to certify the same.

The COURT (FITZHUGH, J., absent,) were of opinion that the deposition was not admissible in evidence, no cause being certified by the mayor for taking the deposition, nor whether notice was given, and on the ground of the interest of the witness.

The COURT was of opinion that the mayor ought to have certified all the facts necessary to make the deposition good evidence under the Act of Congress.

The plaintiff had leave to amend his declaration by adding two new counts, on payment of all antecedent costs. Juror withdrawn.

THORNTON and WHITE, Commissioners of the City of Washington, v. CALDWELL, Administrator of Scott.

If the notary does not recollect the fact of making a demand, &c., but produces his notarial book in which the fact is stated, and testifies that he made the entry in his

United States v. Brent.

book at the time, and is certain, from those memorandums that he did make the demand as there stated — such evidence is admissible to the jury.

ASSUMPSIT against the indorser of a promissory note payable 4th February, 1801, drawn by U. Forrest for six thousand two hundred and sixty-nine dollars and ninety-two cents.

Samuel Hanson, a notary-public, was sworn for the plaintiffs.

Mr. Jones, for the plaintiff, asked the witness whether he had the note and called on General F. for payment on the 9th of February, 1801. The witness said he had no recollection of it, but he made a note of it in his register of protests, and indorsed on the note the words "protest, 1.70," which he produced, and said he had no doubt of it, but he could not speak from his memory; that his memory was not refreshed by the book, for he had no recollection of the fact, but he had no doubt of it. He was certain, from those memorandums, that he did demand the payment as there stated. The note was only noted for non-payment — never actually protested — that is, the protest was never drawn out in form.

Mr. Jones contended that the noting in the book is as much an official act of the notary as the protest would have been, and is as much evidence of the fact of the demand; it is the best evidence. The witness means that he was in the habit of entering there all notes by him protested, the time of demand and the answer given to the demand. That he never made an entry in the book which was not true.

Mr. P. B. Key and *Mr. Caldwell*, *contrà*, cited Chitty, 91. Noting is not sufficient; there must be a protest, if protesting be necessary. The notary is a mere agent of the plaintiff as to giving of notice to the defendant. His official duty only extends to protesting according to the law merchant. His duty at all events did not extend beyond demanding payment from Forrest the maker, and protesting it for non-payment.

The COURT (having some doubts) admitted the testimony as competent evidence to the jury, not because the notary's book had any peculiar authority or validity; but because it appeared to be the best evidence which under such circumstances could be expected.

UNITED STATES, use of James & Benson McCormick, v. D. C.
BRENT, Marshal of the District of Columbia.

The marshal is liable upon his official bond if he suffers a debtor to escape after arrest upon a *capias ad satisfaciendum*, although he has him in court at the return day.

DEBT on the Marshal's official bond.

Brooke v. Potowmack Company.

The facts agreed were that the marshal arrested Jane Burch on a *capias ad satisfaciendum* at the plaintiff's suit, and voluntarily suffered her to go out of prison for three days, after which she returned and was discharged under the insolvent act before the return day of the writ.

Mr. J. Law, for the plaintiff. After a voluntary escape the sheriff cannot retake the defendant; and whether in custody again or not, is of no importance, as the sheriff has made himself liable. 3 Bl. Com. 415. It is not important whether the escape is before or after the return of the *capias ad satisfaciendum*. *Hawkins v. Plomer*, 2 W. Bl. 1049; *Pitcher v. Bailey*, 8 East, 171.

The law and the form of the *capias ad satisfaciendum* are the same in Maryland as in England. 1 Harris, Ent. 642. So also are the forms of the pleadings. The acts of Maryland, 1768, c. 10, 1794, c. 54, and 1779, c. 25, do not alter the law of England.

Mr. F. S. Key, and *Mr. Morsell*, *contrà*. That part of the common law of England was not adopted in Maryland, because not applicable to the circumstances of the country; there being no jails in Maryland for a long time; and even now there are some counties without public jails.

No case has been produced of such a suit in Maryland. The sheriff there is not considered liable if he has the body at the return of the *capias ad satisfaciendum*.

The Act of Assembly 1768, c. 10, has pointed out another remedy, viz. by judgment against the sheriff on his return.

CRANCH, C. J., mentioned Judge Chase's letter to Mr. Tilghman, October 20, 1798, in which he says the act 1 Rich. 2, c. 12, giving the action of debt for escape of prisoners in execution, is in force in Maryland.

After consideration, the COURT in April, 1811, (*nem. con.*) rendered judgment for the plaintiff, observing that the law of England is admitted, and no practice in Maryland is sufficiently proved to the contrary.

BROOKE v. POTOWMACK COMPANY.

A guardian appointed in Prince George's county, in Maryland, is competent to give a valid receipt for the purchase-money of land in Montgomery county.

ASSUMPSIT on an award. Upon a case stated, the question was, whether Brooke was entitled to interest before he came of age, it being alleged that there was no person competent to receive the money, the plaintiff having been a minor on the 20th of July, 1799, when the award was made. Beale was appointed

Davis v. Wyer.

guardian of Brooke in Prince George's county, where the administration of the personal estate was granted, but the land condemned for the use of the Potowmack Company and submitted to the award of arbitrators, was in Montgomery county.

Mr. F. S. Key, for the defendant, contended that Beale had no authority to receive the purchase-money, because he was not appointed guardian in Montgomery county.

Judgment for the plaintiff, the COURT being of opinion that a guardian appointed in Prince George's county, was competent to receive the purchase-money in Montgomery county.

WILLIAM DAVIS v. URIAH WYER.

The proceedings upon attachment, upon an assigned cause of action, must be in the name of the legal plaintiff; and all the requisites of the statute must be complied with.

ATTACHMENT under the Act of 1795, c. 56.

The justice certified that William Davis made oath that the defendant is *bonâ fide* indebted to him in the sum of \$92.50, &c., according to the act, and that William Davis at the same time produced before him a memorandum of a settlement betwixt the said Uriah Wyer and Jacob Todhunter, which memorandum was assigned to the aforementioned William Davis, by which it appeared that the said Uriah Wyer is indebted as aforesaid, and upon which memorandum of a settlement, the said oath was granted."

The memorandum produced to the clerk was in the words following: "December 8th, 1807, this — settled with Jacob Todhunter and am due him \$92.50 as witness my hand. Uriah Wyer." "I do hereby assign all my right, title, claim, and interest to the above to William G. Davis. Jacob Todhunter."

Mr. F. S. Key moved (if the Court should suppose an amendment necessary,) to amend the *capias ad respondendum*, by striking out the name of William Davis, and inserting in lieu thereof, the name of Jacob Todhunter. The *capias* had been returned *non est*. No copy of the short note had been set up, &c. The proceeding by attachment is an equitable proceeding. It must issue in the name of the equitable plaintiff. Such has been the uniform practice in Maryland.

The COURT (*nem. con.*) on motion, quashed the attachment. There was no evidence that a copy of the short note had been set up at the court-house door, nor that the proofs exhibited to the justice, were lodged with the clerk. The attachment was in the

Negro Joice v. Alexander.

name of W. Davis, but the assignment of the account was to W. G. Davis. The handwriting of Todhunter was not proved.

CRANCH, C. J., said the attachment must be in the name of the legal plaintiff.

NEGRO CLEM JOICE' v. ROBERT ALEXANDER.

The two jurors first sworn in a cause, are the proper triers of a challenge for favor.

The Court will not permit counsel to argue to the triers upon a challenge for favor.

The challenged juror cannot be examined as a witness to the triers.

Witnesses may be separated, and examined each out of hearing of the others.

The reputation which can be given in evidence, must be a reputation among free white persons who are dead, or whose death may be presumed.

A deposition of a deceased person taken in another cause, may be read in this, as hearsay.

PETITION for freedom. Four jurors having been sworn, Matthew Wright was called as a juror, and challenged for favor; whereupon the two jurors first sworn, were sworn as triers, and having heard testimony as to Wright's declarations that "they had better not summon him on negro causes, for he would free them all," were directed by the Court to withdraw to consider of their verdict, and having done so, attended by an officer of the court, they returned and declared that Matthew Wright did not stand indifferent between the parties.

The COURT (DUCKETT, J., absent) refused to suffer counsel to argue the case before the triers; but at the request of the defendant's counsel, instructed the triers that the question for them to decide was, whether Matthew Wright stood as a fair, indifferent, unbiased, unprejudiced juror between the parties. On the trial before the triers, the counsel for the petitioner offered to swear Matthew Wright himself, to state what he did say, but the Court refused, as the question was whether he was indifferent, and if partial as a juror, he might be supposed not a proper witness. (*Quære de hoc?*) See *Trials per pais*, 192, 200.

A record of a case from the General Court of Maryland was produced, in which it appeared that only the two first sworn jurors were sworn as triers, although five had been sworn.

CRANCH, C. J., thought that all the jurors sworn, should be triers of the challenge. *Trials per pais*, 199.

Mr. F. S. Key, for the defendant, suggested that the witnesses for the petitioner were of bad character, and believed they would not testify fairly if permitted to hear each other's testimony, and moved the Court to direct that all the plaintiff's witnesses but one should be excluded from the court room, which the Court granted.

CRANCH, C. J., doubting very much as to the propriety of such a practice as a general rule, without some further evidence of combination or corruption.

Mr. Key stated, that in the case of *Rutherford v. Moore*, for slander, at Washington, in June, 1807, [*anté*, 404,] the Court had made a like order. But although the Court had notes of that case, they had no note of such a decision.

Mr. Caldwell, for the petitioner, asked the witness what was the general reputation of the neighborhood as to the condition of Ann Joice, who was alleged to have been brought into this county by Lord Baltimore, viz., whether she was a free white woman.

Mr. Key objected to the question, and

The COURT refused to permit it to be asked, and said that evidence of general reputation of a fact, can only be given when the reputation was among free white persons who are dead, or presumed from the length of time to be dead.

Mr. F. S. Key, offered a record of the Prince George's Court, of the petition for freedom by the mother of the petitioner against N. Young, under whom the defendant claims property, which record stated that the petitioner "no further prosecuted her petition."

The COURT refused to admit it in evidence, it being wholly immaterial to this issue, whether such a petition were dismissed or not, although it be proved that the petitioner in that case was the mother of the present petitioner, and that the present defendant claims under N. Young.

Mr. Key having proved that Thomas Lane was dead, offered to read his deposition, contained in a record from the General Court of Maryland, in a suit between Mahony and Ashton, as the declaration of a person now dead.

Mr. Hiort, *Mr. Caldwell*, and *Mr. Morsell* objected. If this cannot be used as a deposition, it is no evidence of his declaration. This is not in the handwriting of Lane; he has not signed it. The deposition is not a matter of record; this is only a copy made by the clerk from a paper filed in his office. It is not his duty to certify such papers. His certificate is not better evidence than that of any other person; even if the original deposition could be evidence, a copy is not. The magistrate, before whom the deposition was taken, might be examined as to the declarations of *Mr. Lane*.

The present petitioner has no opportunity of cross-examination. *M'Nally*, 390. The petitioner might, perhaps, show that he was interested. The deposition appears on the face of it to have been read by consent.

Mr. Key, in reply. The original deposition cannot be had out

Cherry v. Sweeny.

of the Court. It is made part of the record, by a bill of exceptions. The record is offered to the Court, (not to the jury) to satisfy the Court that it is the deposition of Lane. The clerk is bound to record all depositions filed in a cause. They make a part of the record. The entry in the record is, "that the said John Ashton, by his attorney, comes here into court and files the following deposition."

[No bill of exceptions made the deposition a part of the record. The question, therefore, was whether a certified copy of a deposition filed in the office of the clerk of the General Court of Maryland, be evidence of the declaration of Lane. The certificate of the clerk was authenticated by the chief justice of the court.]

The COURT (DUCKETT, J., absent, and CRANCH, C. J., doubting) admitted the copy of the deposition to be read in evidence to the jury, as the declaration of a deceased person.

Verdict for the defendant.

CHERRY v. SWEENY.

Information given by one juror to his fellow jurors after they have retired, is not sufficient ground for a new trial, if the verdict has done substantial justice between the parties.

The Court will not lend an easy ear to affidavits of jurors, as to their proceedings after they have retired to consider of their verdict.

MOTION by defendant for a new trial, because one of the jurors gave information of his own knowledge, after they retired, viz. : that he had heard both from the defendant and plaintiff, that the defendant was not to be allowed any thing for the services of her son ; which was a claim in set-off which she had attempted to prove on the trial.

Mr. Law, for the defendant.

1. It is a good ground for a new trial. 1 Bl. Com. 374, 375 ; 3 Id. 373.

2. The fact may be proved by the affidavits of the jurymen. 1 Sellon's Pr. 508 ; *Cogan v. Ebdon*, 1 Burr. 383 ; *Rex v. Simons*, 1 Wils. 329 ; *Hale v. Cove*, 1 Str. 642 ; *Vassie v. Delaval*, 1 T. R. 11.

The reason why the affidavit of a juror is rejected, is, that he shall not charge himself with a misdemeanor. But where the fact does not charge misconduct, there such affidavits are admitted.

Mr. Porter, contra, contended that justice had been done, and that encouragement should not be given to information coming from a juror. 3 Wils. 273; 1 T. R. 11; 3 Burr. 1696; 1 Selton, 507, 508, 510.

New trial refused, (FITZHUGH, J., absent,) the COURT being of opinion, that substantial justice had been done, and doubting the policy of giving an easy ear to affidavits of this kind.

CIRCUIT COURT OF THE UNITED STATES.

APRIL 10, 1809, ADJOURNED COURT, AT WASHINGTON.

Ex parte NEGRO BEN.

A writ of error is not a *supersedeas*, unless a copy of it be lodged for the adverse party in the clerk's office within the ten days.

HABEAS CORPUS *ad subjiciendum*. The *mittimus* returned, was in the following form, viz.

"District of Columbia. County of Washington, ss. Whereas it is represented by Sabret Scott to the subscriber, a justice of the peace, that his negro, Ben, has run away from his service, and otherwise treated him ill, and fears that the said negro Ben will run away again, and therefore prays a commitment for safe keeping: These are therefore to authorize and require you to receive the said Ben, and him safe keep in your jail until his said master releases him therefrom, or he be otherwise legally discharged. Given under my hand and seal this 23d day of March, 1809. (Signed.) John Ott. (L. s.) The marshal of the District of Columbia."

Mr. F. S. Key, for the prisoner, contended that he was free by the judgment of this Court, rendered on the 19th of June, 1807, and that the writ of error did not suspend the judgment. The citation was not served until January 12th, 1808. No copy of the writ of error was lodged in the office of the clerk, for the master, as required by the 23d section of the Judiciary Act of 1789, [1 Stat. at Large, 73.] It was no *supersedeas* to the execution, because no execution could issue. The judgment of the Court only ascertained the right of the negro to his freedom. The effect of the *supersedeas* is only to stay the execution, not to suspend the judgment.

Mr. Jones, contra. The writ of error was left in the office within the ten days, viz., on the 22d of June, 1807, and while it remained there, no copy was necessary for the adverse party. '

The Court, then consisting of CRANCH, C. J., and FITZHUGH, J., being divided in opinion, the prisoner was remanded.

Ex parte Negro Ben.

But at June term, 1809, the prisoner was brought up again by *habeas corpus*, and the Court being full he was discharged, the COURT (FITZHUGH, J., *contrà*,) being of opinion that the writ of error could not be served so as to be a *supersedeas*, unless a copy thereof should be lodged in the clerk's office for the adverse party within ten days after the judgment.

CIRCUIT COURT OF THE UNITED STATES.

JUNE TERM, 1809, AT WASHINGTON.

THORNTON, Surviving Commissioner, *v.* STODDERT.

The superintendent of the city of Washington, was a competent witness in an action brought in the name of the former commissioners, although all their rights and duties had devolved on him by force of the statute.

If a notary-public produces his register of protests, containing a memorandum of the demand, &c., and testifies that he is sure that the entry is correct, that he made it at the time, and that it has not been altered, such evidence is admissible to prove the demand, although the notary had otherwise, no recollection of the fact.

If Saturday be the last day of grace, a demand of payment on Monday, is too late to charge the indorser. Subsequent acknowledgment and promises made under an ignorance of the fact of such neglect of demand, or of the law arising upon such neglect, are not obligatory.

The Court refused to repeat the instructions given in O'Neale's case.

If the defendant indorsed as surety as to any part of the amount of the note, he was entitled to strict notice. If he was jointly interested with the maker in the property for the protection of which the note was given, he was not entitled to notice.

ASSUMPSIT, upon an indorsement of a promissory note drawn by U. Forrest, for \$16,407, due 4-7th of February, 1801, dated 6th of August, 1800. The writ issued 23d of April, 1803.

Mr. Jones, for the plaintiff, offered *Mr. Thomas Munroe*, as a witness.

Mr. Morsell and *Mr. C. Lee*, objected: That all the rights of Thornton, and the other commissioners of the city of Washington, vested in *Mr. Munroe*, by the Act of Congress of May 1st, 1802, [2 Stat. at Large, 181,] under which he was appointed superintendent. He is bound for the costs, as much as an administrator. This cause is to be considered as if *Mr. Munroe* was the nominal plaintiff.

The COURT stopped *Mr. Jones*, in reply, being of opinion that no interest was disclosed in *Mr. Munroe*. The only objection which could have been made would be the technical objection that he was plaintiff, (if that had been the case.) But as he is not plaintiff, we can see no interest whatever that can exclude him from being a witness.

Samuel Hanson, a notary-public, being called, produced a book which he called a register of protests, in which was an entry of his having called on *Forrest* upon the 9th of February, for pay-

ment, and testified that he was sure that the entry was correct; that it was made at the time in his handwriting, and had not been altered; but he had otherwise no recollection of the fact.

The COURT admitted his testimony as competent to prove the fact of the demand. Bill of exceptions taken.

The Court decided that as the 7th of February was the last day of grace, and the 8th was Sunday, payment of the note ought to have been demanded of Forrest on the 7th, and a demand on the 9th, was too late, all the parties living in the same town.

The Court also decided that any subsequent acknowledgments or promises made by the defendant under an ignorance of the fact of such neglect of demand or of the law arising upon such neglect, were not obligatory.

The Court also decided that, they would not reconsider now the questions of law, decided in the case of O'Neale now before the Supreme Court, and refused to give the like instructions as in that case.

The COURT, (Monday, June 12th, DUCKETT, J., absent,) was of opinion, that if the defendant indorsed the note as surety for Forrest, as to any part of the amount of the note, he was entitled to strict notice as indorser, although he was interested separately in part of the note, and that the plaintiff could not recover unless he proved a demand on U. Forrest before the 9th of February.

But if the defendant was jointly interested with Forrest, in the property, to relieve which from forfeiture the note was given, then the defendant was not entitled to notice, being as much the principal debtor as U. Forrest.

UNITED STATES v. ROBERT SPEEDEN.

The game called "Equality" is a "device" prohibited by the Act of Maryland, 1797, c. 110. The words "or other device," are not so loose and vague as to be rejected.

INDICTMENT for keeping a gambling-device, called "Equality," under the Maryland law of 1797, c. 110.

Mr. Law, for the defendant, prayed the Court to instruct the jury, that the defendant was not liable for the penalty under the act. The words "or other device," being too loose and vague, are to be rejected.

But the COURT refused; it not being a capital case, and the intention of the law being very clear and plain.

ROGERS *et al.* v. CROMMELIN.

After an appearance entered at a previous term it is too late to call for the authority to appear.

MOTION by *Mr. Jones* and *Mr. F. S. Key*, to dissolve the injunction without answer.

CRANCH, C. J., being a nominal plaintiff, did not sit in the cause.

Mr. R. B. Key and *Mr. C. Lee* called on the defendant's attorneys for their authority to appear.

Mr. Jones and *Mr. F. S. Key*, *contrà*, contended that the objection was too late as an appearance had been entered at the last term; and

The COURT was of that opinion.

JAMES AND JOHN DUNLOP v. THOMAS MUNROE.

The instructions of the postmaster-general to the deputy-postmasters, may be given in evidence in an action on the case against a deputy-postmaster for negligence.

An averment that the defendant neglected to send forward a letter, "as it was his duty to do," is only an allegation that the defendant was bound to send it by the mail; not that he did not send it by the next mail.

If the allegation be that the defendant did not send on the letter, it is a sufficient answer to say and prove that the defendant did send it on; and he is not bound to prove that he sent it on in a reasonable time. A deputy-postmaster and his clerks are only bound to use such care and diligence in the discharge of their duties, as a prudent man exercises in his own affairs.

Deputy-postmasters are civilly liable for the acts of their servants and clerks; but the neglect of the servant or clerk cannot be given in evidence upon a count charging the loss to have been incurred by the neglect of the deputy-postmaster himself.

A count charging the loss to have been by the misfeasance of the defendant or some other person employed by him, is not bad upon general demurrer.

An averment that a letter, containing bank-notes, was fraudulently and improperly secreted, withheld, and taken in the post-office by the defendant, is not a charge of felony, so as to deprive the plaintiffs of their civil remedy.

When a plea is pleaded to certain enumerated counts, the plaintiff may reply to it specially as it applies to some of the counts, and demur to it as it applies to other counts.

Hypothetical pleas, which neither admit nor deny the matter charged, are bad upon general demurrer.

A deposition taken, without notice and not upon interrogatories, under a commission issued by consent, cannot be read in evidence.

The plaintiffs' clerk who puts the letter into the post-office is a competent witness for the plaintiffs, without a release.

Parol evidence is admissible to prove that A B, before whom a deposition was taken, was a justice of the peace.

It is to be presumed, *primâ facie*, that a sworn officer has discharged his duty faithfully. The Court will not permit the jury to be polled unless some reason be assigned therefor.

THIS was an action on the case to recover from the postmaster

at Washington, the value of bank-notes lost in the course of the mail.

The cause first came before the Court at December, 1807. The declaration then contained only two counts: 1st, for fraud. 2d, for negligence of the defendant himself in not sending on the letter, with its contents, to Petersburg, as it was directed, "and as it was his duty to do," whereby the plaintiffs lost the money.

The COURT (*nem. con.*) permitted the plaintiffs to give in evidence to the jury the printed circular instructions given by the postmaster-general, to the deputy-postmasters according to the post-office law of 2d March, 1799, to show the forms of transacting the business in the office, and the duties of the defendant:

And, upon the prayer of *Mr. Jones* and *Mr. Morsell*, for the defendant, instructed the jury that, upon the 2d count, it was incumbent upon the plaintiff to satisfy the jury, by evidence, that the letter and its contents were received by the defendant at his office, and that he did not send them to Petersburg; and that the loss happened in Washington; being of opinion that the words "as it was his duty to do," were only an allegation that the defendant was bound to send on the letters by mail, and did not amount to an averment that the letter was not sent on in the next mail.

The COURT refused to instruct the jury that the plaintiff could recover upon the facts stated unless the defendant could show that he sent on the letter and notes in reasonable time after he received them. The ground of the refusal was, that the declaration charged a specific act of negligence, viz. that the defendant did not at any time send on the letter and notes, and that it would be a good defence to this count if the defendant could show that he had sent on the letter and notes in the mail at any time before the action brought.

Mr. Jones, for the defendant, prayed the Court to instruct the jury that the defendant is not liable for the mistakes of his sworn clerks, nor for theft by a casual visitor, unless the defendant was guilty of gross negligence in admitting improper visitors, nor for such negligence of his said clerks in admitting such visitors.

Mr. C. Lee, *Mr. F. S. Key*, and *Mr. P. B. Key*, for the plaintiffs, *contra*, contended that if the defendant can defend himself in this action by the acts of his clerks when he is charged with his own negligence, he is liable for their negligence, and that it is immaterial whether the letter and notes were lost by his own negligence, or that of his clerks.

The COURT (DUCKETT, J., absent,) refused to give the instruction as prayed, but instructed the jury, that if they should be satisfied by the evidence that the letter and notes were received in the defendant's office at Washington, and were not sent on to Peters-

Dunlop v. Munroe.

burg, and that the defendant, and his clerks and servants exercised with respect to the said letter and notes that degree of care and diligence which a prudent man would have taken of his own property, the defendant is not liable in this action for any loss which happened by reason of not sending on the same to Petersburg.

A bill of exceptions was taken by the plaintiffs' counsel, but a juror was withdrawn; the plaintiffs had leave to amend, and the cause was continued till the next term.

June 20th, 1808. The cause came on again for trial upon the amended declaration, which charged the defendant with the loss, whether it happened in Washington, or between Washington and Petersburg.

Mr. Jones, for the defendant, prayed the Court to instruct the jury that the defendant is not liable, under the first count, for the embezzlement or fraud of his clerks, provided he used due diligence and caution in appointing clerks of good repute for fidelity and honesty, and of fair reputation, who took the oaths required in the postmaster-general's instructions; unless such misconduct was known to the defendant in time to have prevented it. He relied upon the case of *Whitfield v. Lord Le Despencer*, Cowp. 754.

But the COURT, (FITZHUGH, J., *contra*,) refused the instruction, being of opinion that the defendant was civilly liable for the acts of his servants or clerks, as much as if those acts had been done by himself.

Mr. Jones, for the defendant, then prayed the Court to instruct the jury, that upon the counts charging the loss to have arisen from the personal negligence of the defendant, the plaintiffs cannot recover without proof of such personal negligence.

Mr. C. Lee and *Mr. F. S. Key*, *contra*, contended that those counts might be supported by proof of the negligence of the defendant's clerks, and cited Esp. N. P. 657, 703, and *Brucker v. Fromont*, 6 T. R. 659.

Mr. Jones, in reply, cited Esp. N. P. 651.

The COURT (*nem. con.* but with some hesitation,) gave the instruction as prayed, notwithstanding the case of *Brucker v. Fromont*. The judges in that case did not, on reason and principle, approve their own decision, but considered themselves bound by the case of *Turberville v. Stampe*, 1 Ld. Raym. 264, which case, in the opinion of this Court, does not justify the inference drawn by the judge in *Brucker v. Fromont*. It is certainly most convenient and just that the plaintiff should set forth his cause of action as it really is, and the Court thinks that the plaintiffs ought to be holden to the strict proof of their declaration.

The plaintiffs, then, had leave to amend their declaration, on payment of the costs of the term, and a continuance if the other party should desire it; whereupon a juror was withdrawn, and the cause was again continued.

February 2d, 1809. This cause came on again upon the amended pleadings, the plaintiffs having filed a new declaration, consisting of nine counts, to which the defendant pleaded eighteen pleas, to some of which the plaintiffs demurred, and upon others joined issue; for a particular statement of which, see 7 Cranch, 242.

The Court decided all the demurrers in favor of the plaintiffs. The first was special, and was to so much of the fifth plea as virtually denied the defendant's personal liability for the acts of his clerks, provided he had used due precaution, diligence, and circumspection, to have the business of the office well conducted, by appointing and employing as clerks, none but persons of competent skill and knowledge, of fair character, of known good repute for fidelity and honesty, and who had taken the oaths required by law, and by the instructions of the postmaster-general.

The plaintiffs contended that the defendant was personally liable for the acts of his clerks, and that it was immaterial whether the loss happened through their neglect or his.

The defendant contended that the first and second counts, to which alone the fifth plea was applicable, were bad, because they charged that the letter and bank-notes were secreted and taken by the defendant, or some other person employed by him, which was too uncertain a charge, even if the defendant was liable for the acts of his clerks, which he denied, unless those acts were done with the knowledge and consent of the defendant. He contended that the clerks of the deputy-postmaster bear the same relation to him, as the deputy-postmasters do to the postmaster-general. They are all equally sworn officers of the United States, and each liable only for his own acts in the discharge of his several duties, as appears by various provisions of the post-office law of 2d March, 1799. He also relied upon *Whitfield v. Lord Le Despencer*, Cowp. 754, and *Lane v. Cotton*, 1d. Raym. 647.

The plaintiffs relied upon the general rules of law, applicable to the relations of master and servant, and principal and agent, and cited 1 Salk. 18, 282, 440, 441, 637; *Rowning v. Goodchild*, 3 Wilson, 443, and *Dyer*, 238, (b.) pl. 38. The case of *Whitfield v. Lord Le Despencer*, is not an authority for this case, because the letters patent by which the defendants in that case were appointed, expressly declare that they shall not be "responsible for the officers appointed by them" — "save only for their own voluntary defaults or misfeasances," which the act of Congress does not. The inferior offices were established by the act of Parlia-

ment. The officers gave bond to the king for his use. They were to take the oaths of allegiance and supremacy, and to receive payment for their services from the receiver-general, and not from the postmaster-general. The revenue arising from postages, was to be applied to the public use. But in the present case, the offices of the clerks of the deputy-postmasters, are not created by the Act of Congress; they are his private clerks and servants; they give no security to the United States; they receive no pay from the United States, but are paid by the postmaster out of the revenues of the office.

Although all persons "employed in the care, custody, or conveyance of the mail," are required by the second section of the act of 1799, to take an oath "faithfully to perform all the duties required of them, and abstain from every thing forbidden by the laws," &c.; yet this does not constitute them independent officers, or in any manner alter the relation between them and their employers. As to the alternative charge in the first and third counts, it is certain to a common intent, and if the postmaster is liable for his clerks, it is sufficient upon general demurrer. But the plea is also bad because it is hypothetical, and does not admit or deny the fact that the letter and bank-notes were received in the defendant's office, or lost or embezzled by the defendant or his clerks, but only says if, &c., then such embezzlement was without any participation or connivance of the defendant.

The COURT (FITZHUGH, J., *contrà*,) was of opinion, that the defendant was liable for the negligence of his clerks, and that therefore the plea was bad, and that the declaration was not faulty in substance, on account of the alternative averment, which, they thought was substantially an averment of embezzlement by the defendant and his clerks. The next demurrer was to the seventh plea, pleaded also to the first and second counts, and which was grounded upon the supposition that the facts stated in those counts amounted to felony.

The COURT, however, (DUCKETT, J., *contrà*,) was of opinion, that the facts stated in those counts did not amount to felony and adjudged the plea bad.

The COURT, also, (*nem. con.*) was of opinion, that all the hypothetical pleas were bad, on general demurrer. The fourteenth plea was pleaded to the second, fourth, fifth, sixth, seventh, eighth, and ninth counts. As it applied to some of these counts, the plaintiffs replied specially, and as to the other counts to which it was pleaded they demurred.

To this course, *Mr. Jones*, for the defendant, objected, and contended that as the plea was pleaded to all those counts jointly, the plaintiffs could not apply it severally to each count.

But the COURT (DUCKETT, J., *contrà*,) overruled the objection, and said that the plaintiff might demur to the plea as it applied to some counts, and reply to it as it applied to other counts. And as it was one of the hypothetical pleas, it was adjudged bad upon the demurrer.

April 10th, 1809. The COURT (DUCKETT, J., absent,) was of opinion that the sixteenth and seventeenth pleas were bad, because they neither admit nor deny that the letter arrived at the defendant's post-office on the first of August, in time to be sent on to Petersburg by the mail of the next day; and that the eighteenth was bad because it was hypothetical and argumentative, &c.

June 19, 1809. Upon the trial of the issues of fact, which occupied a whole week, a great number of bills of exceptions were taken. Those taken by the plaintiffs are stated in 7 Cranch, 242, &c. But, as there was a general verdict for the defendant upon all the issues, the points ruled against the defendant, are not there reported.

Mr. C. Lee offered to read a deposition taken in Philadelphia, under a commission issued by consent, but without interrogatories filed, and without evidence of notice to the defendant of the time and place of taking it.

The defendant's counsel objected, and the COURT sustained the objection.

Mr. Jones, for the defendant, objected to the testimony of Mr. Stevens, the plaintiff's clerk, who delivered the letter into the post-office in Philadelphia, that he was interested, as by fixing the loss on the defendant, he would exonerate himself.

Mr. C. Lee, for the plaintiffs, cited Peake's Evidence, 101, and

The COURT overruled the objection. The Court permitted parol evidence to be given that John Townes, before whom a deposition was taken in Virginia, was a justice of the peace, upon the authority of *Turner v. Fendall*, 1 Cranch, 117, and *United States v. Bollman & Swartwout*, in 1807, 4 Cranch, 75.

Mr. Jones, for the defendant, moved the Court to instruct the jury, that the neglect to re-mail the letter by the first mail, does not make the defendant liable, unless the loss happened in consequence of such neglect, and that such neglect was wilful and amounted to gross negligence;—

Which instruction the COURT refused to give, but instructed the jury in effect, that the defendant and his clerks were bound to exercise that degree of care and diligence which a prudent man usually exercises with regard to his own affairs; and that a non-compliance with the instructions of the postmaster-general as to the time of making up the mails, &c., might be excused by circumstances. That the time allowed by the Act of Congress for

Dunlop v. Munroe.

making up the mails is *prima facie* a reasonable time, and that the burden of proof is on the defendant to justify a non-compliance with the act in that respect.

And upon the prayer of the defendant's counsel, the Court further instructed the jury that the defendant, being a sworn officer, is to be presumed to have done his duty faithfully until the contrary is proved. And the Court refused to permit evidence of the negligence of the defendant's clerks to be given on the issues joined upon the sixth and tenth pleas to the fifth and ninth counts, which charged the loss to have been incurred by the defendant's own negligence.

Upon the coming in of the jury with their verdict, the counsel for the plaintiff moved the Court that the jurors should be polled, that is, asked individually if they had agreed to the verdict. 3 Bac. Ab., Juries, G; 2 H. P. C. 299; 29 Assizes, 27; 40 Id. 10.

CRANCH, C. J., said there had never been such a practice in this Court; and that it was strongly impressed on his mind that such an application had been made and refused; but he could not recollect in what case.

Mr. Key mentioned a case of assault and battery in Frederic county, in Maryland, where it was conceded that the jurors might have been polled, and the only doubt was, whether the right had not been waived by the question having been put to them generally, in the usual form, whether they had agreed of their verdict.

Mr. Lee also mentioned a case in the Winchester District Court in Virginia, where it had been done.

FITZHUGH, J., asked whether in those cases there had not been a suspicion, or suggestion of improper conduct in the jury.

Mr. Key stated that there was no direct suggestion in the case alluded to by him; but one of the jurors having been sick, it was suspected that possibly the verdict had been agreed to be rendered without his full assent. It, however, seemed then to be a demand of common right.

The COURT (DUCKETT, J., absent,) said it was not a matter of common right to poll the jury, and they would not fix a precedent by which either party might capriciously insist on polling the jury without assigning any reason therefor.

FITZHUGH, J., added, that the want of practice is strong evidence of the want of right. An extraordinary case should be made out to justify a departure from the ordinary course of proceeding.

Verdict for the defendant upon all the issues.

(Affirmed by the Supreme Court of United States, 7 Cranch, 242.)

Banks v. King.

BANKS v. MILLER.

It is a sufficient averment of the residence of the adverse party, by the magistrate who takes a deposition under the Act of Congress, if he certifies that it appears to him that the party resides more than one hundred miles from the place of caption. If books and papers are in court they may be called for after the jury is sworn.

A DEPOSITION, taken under the Act of Congress, was offered in evidence by the defendant. The magistrate who took it, certified that it appeared to him that the adverse party and his counsel resided at the city of Washington, upwards of one hundred miles from the place of taking the said deposition.

Mr. Caldwell, for the plaintiff, objected, that it was not a positive averment that the adverse party and his attorney were at the time more than one hundred miles, &c.

But the COURT (DUCKETT, J., absent,) overruled the objection.

After the jury was sworn, the defendant called on the plaintiff to produce his books of account, which were then on the table.

The Court thought it due notice, as the books were in court.

BANKS, an Insolvent, for the use of his Trustee, v. GEORGE & A.
KING.

In an action by an insolvent debtor for the use of his trustee, the defendant may set off the plaintiff's note to a third person, with a blank indorsement, upon proof that the note came to the defendant's hands before the insolvency; but he cannot set off a joint note of the plaintiff and another.

ASSUMPSIT for goods sold; *non assumpsit*, and discount pleaded in bar. The defendant offered to set off a note made by the plaintiff to John Templeman, and by him indorsed in blank.

Mr. Porter, for the plaintiff, objected that it did not appear at what time the note came to the hands of the defendants, and that the precise time must be proved. *Dixon v. Evans*, 6 T. R. 57.

The COURT (DUCKETT, J., absent,) permitted the defendant to read the note in evidence, on proof that it came to his hands before the plaintiff's insolvency.

Mr. Morsell, for the defendant, offered to set off a note due from Lowdermilk & Banks to Kunkle & Ghequere, and by them indorsed to the defendant, and offered to prove that the original debt was due from Banks alone for goods sold him by Kunkle & Ghequere.

Mr. Porter, for the plaintiff, *contra*, objected that they must be mutual debts, and due in the same right, and cited 1 Powell on

Auld v. Hoyl.

Cont. 440; 1 H. Bl. 659; 1 Wils. 155; Buller, 179, and Cowp. 133.

And of that opinion was the COURT, (DUCKETT, J., absent.)
Verdict for the plaintiff.

AULD, Assignee of W. Wilson, *v.* HOYL, Administrator of Deakins.

A British subject who, before the treaty of 1794, took a bond in the name of a citizen of the United States, cannot avoid the statute of limitations, by claiming the benefit of the clause of the treaty which removed all legal impediments in the recovery of British debts.

DEBT on bond — plea that the bond was of twelve years standing, and barred by the statute of limitations.

Replication that the bond was taken for a debt due to Dunlop & Co., British creditors, before the war, and that the British treaty removed that lawful impediment.

The COURT (DUCKETT, J., absent,) adjudged the replication to be bad; observing that if a British creditor covers his debt under the name of a citizen he must take citizen's law.

CIRCUIT COURT OF THE UNITED STATES.

JULY TERM, 1809, AT ALEXANDRIA.

HENRY'S EXECUTOR *v.* RICKETTS, NEWTON & Co.

Misbehavior of jurors is not a ground for a new trial, if it has not affected the verdict. The refusal of a new trial is not error.

If the defendant take and return the deposition of an interested witness, he cannot object to its being read on the trial, because the witness was interested. *Quere.*

If the Court is divided upon an objection to evidence, the objection does not prevail.

In an action upon the acceptance of a bill of exchange drawn by W. Hartshorne upon the defendants in favor of Ashley, and by him indorsed to Henry; the defence was that the ship *Rose* was transferred to Hartshorne in payment of the bill, under a contract signed by Ashley.

Ashley, the indorser of the bill, and who had signed the contract, had been produced and examined by the defendants, and his deposition taken *de bene esse*, under the thirtieth section of the Judiciary Act, and the plaintiffs had cross-examined him. The deposition was returned and filed, and at the trial the plaintiffs offered to read the deposition. The defendants' counsel objected that it appeared from the papers that the witness was interested, both as indorser and as a guarantor of the contract. To which the plaintiff's counsel answered, that the defendant, by producing and examining the witness, had waived the objection of interest; and of that opinion was CRANCH, C. J. FITZHUGH, J., *contrà*. DUCKETT, J., absent.

The judges being divided in opinion, it was still a question, what was the consequence of such disagreement.

But the COURT agreed that the objection did not prevail.

Verdict for the defendants.

Mr. Taylor, for the plaintiffs, moved for a new trial upon two grounds. 1. Newly-discovered evidence. 2. Misbehavior of some of the jurors. James Harris, the bailiff who attended the jury, testified that two of the jurors, without his leave, left the room about 11 o'clock at night, and were intoxicated, (the jury

 Kerr v. Hamilton.

being in their chamber all night.) That spirituous liquors were sent to them in their blankets. That the jury did not inform him that they had agreed upon their verdict till after the Court had opened on the next morning.

The COURT refused to hear any explanation from the jurors implicated, and refused to suffer any of them to testify in regard to the misbehavior.

CRANCH, C. J., said that if the jurors implicated could be heard, it must be as witnesses; and then the other jurors must be examined, which would produce mutual recriminations; and that the general rule in this court, and in other courts, is, not to hear the testimony of jurors upon an allegation of misbehavior.

The COURT refused to grant a new trial.

Mr. Taylor, for the plaintiff, wished to except to the decision of the Court.

The Court said they should not sign a bill of exceptions, as the Supreme Court of the United States had decided that a writ of error would not lie to the refusal of a new trial.

UNITED STATES v. WISE.

Every prisoner, not committed for treason or felony, is entitled to the benefit of the prison bounds, upon giving security.

DEBT on prison-bounds bond;oyer of bond and condition; and general demurrer to the declaration.

The question is whether a prisoner, committed at the suit of the United States, not for treason or felony, is entitled to the prison's bounds, upon giving security under the Act of Congress of 3d of March, 1803, [2 Stat. at Large, 237.]

The COURT (DUCKETT, J., absent,) were of opinion that the bond was good and well taken.

Judgment for the plaintiffs on the demurrer.

ALEXANDER KERR v. ROBERT HAMILTON.

A surety, who has paid money for a bankrupt in discharge of a duty-bond, has not the right of the United States to proceed against the person of the bankrupt, but only against his effects.

ASSUMPSIT for money paid, and money had and received. Plea, discharge under the bankrupt law. Replication, that the money paid for the defendant by the plaintiff, was paid by him to

Janney v. Geiger and Allison.

the United States in discharge of the defendant's bond given for duties in which the plaintiff was his surety.

General demurrer and joinder. The COURT (DUCKETT, J., absent,) upon considering the several revenue laws and bankrupt law, decided that the plaintiff had not the right of the United States to proceed against the person of the bankrupt, but only against his effects.

Judgment for the defendant.

AQUILA JANNEY AND ELISHA JANNEY v. JACOB GEIGER AND AMOS ALLISON.

A count upon the indorsement of a promissory note not payable to order, without averring a consideration for the indorsement, is bad in Virginia.

A plea that the maker of the note had, at the date of the writ, goods and chattels to a greater amount than the plaintiffs' claim, is no answer to an averment of insolvency.

ASSUMPSIT. The declaration had three counts.

1. The first count stated a promissory note made by G. N. Lyles, to Amos Allison and Jacob Geiger, for four hundred and seventy-nine dollars and eighty-nine cents, at ninety days, dated 17th July, 1804, for value received, "negotiable at the Bank of Alexandria," but not payable to order, and avers that it was assigned by indorsement by Allison and Geiger, to the plaintiffs, whereby the plaintiffs were entitled to demand the money from Lyles; but that when payable, he refused to pay it, and was insolvent, of which the defendants had notice, whereby they became liable to pay, &c., and being liable, in consideration thereof promised to pay, &c.

2. The second count stated that the defendants, in order to give a credit to the said note, and to induce some person or persons to receive the same for the full amount and value thereof, and to enable the said Lyles to pass the same for its full value, indorsed the same, and delivered it to Lyles to be negotiated by him for value received, who passed it to the plaintiffs for value received; by means whereof the plaintiffs became entitled to demand of Lyles, the amount thereof, that when payable they demanded payment of Lyles, who refused; of which the defendants had notice; that Lyles was insolvent, by means whereof the defendants became liable, &c.

3. The third count was for money had and received.

The defendants pleaded, — 1. *non assumpserunt*. 2. That on the day of suing out the writ (January 3, 1805,) Lyles had property in his possession, of his own proper goods and chattels, far

exceeding the amount claimed by the plaintiffs. 3. That the defendants never received any value, or consideration of any kind of or from the plaintiffs, or any other person, for the note, or for their indorsement.

To the second plea there was a general demurrer and joinder.

To the third, the plaintiffs replied, that the defendants indorsed the note to give it credit. That after its indorsement it was assigned and delivered to the plaintiffs for a full and valuable consideration; and that the plaintiffs received it upon the credit of the defendants as well as that of the said Lyles.

To this replication there was a general demurrer and joinder.

Mr. Youngs, for the defendants, upon the argument on the demurrers, contended that the first fault was in the declaration which did not aver any consideration for the defendants' indorsement. That if the plaintiffs can recover at all it must be upon the principles of the common law, for the statute of Virginia, of the 4th of December, 1786, § 4, p. 36, which makes promissory notes assignable, only authorizes the assignee to sue in his own name, but gives no right of action against the assignor. By the common law the assignor is only liable to refund what he has received for the note, and if he has received nothing is not liable at all. *Mandeville v. Riddle*, 1 Cranch, 298; *Norton v. Rose*, 2 Wash. 233; *Picket v. Morris*, Id. 255; *Lee v. Love*, 1 Call, 497; *Mackie v. Davis*, 2 Wash. 219.

It is necessary, therefore, in a declaration by the assignee against the assignor, to state the consideration.

Mr. Swann, contra. In *Vowell v. Lyles*, [*ante*, 428,] this Court decided that if the defendant indorsed the note to give it credit, no other consideration is necessary to support the action. The like instruction was given to the jury by this Court in *Patton v. Violet*, at November term, 1807, [*ante*, 463.]

The COURT was of opinion that the first count (upon the mere indorsement of a promissory note not payable to order, without stating any consideration) was bad, but gave the plaintiffs leave to amend.

At July term, 1809, the Court (DUCKETT, J., absent,) was of opinion that the second plea was bad.

Judgment for the plaintiffs.

UNITED STATES v. BLADEN.

If the mortal stroke be given in Alexandria, and the death happen in Maryland, this Court has not jurisdiction of the offence as a homicide, but has jurisdiction of the assault and battery.

INDICTMENT for manslaughter. The right of peremptory challenge was allowed.

The mortal blow was given in Alexandria, the death happened in St. Mary's county, in Maryland.

Mr. E. J. Lee, and *Mr. R. J. Taylor*, for the prisoner, contended that the crime was not punishable here, and cited 1 East, C. L. 361; 1 Hawk. c. 31, § 12, 13; Virginia Law of 29th November, 1792, c. 73, § 16, p. 104.

Mr. Jones, for the United States. There is no evidence of the defect of the common law, but the recital of the Statute of 2 and 3 Edw. 6, c. 24. And the common law was not as recited in that act. The Statute of Virginia was made to repeal the Statute of Edward, which was then in force in Virginia, and is not confined to counties in the State of Virginia, but speaks of contracts generally. The Statute of Virginia is no evidence that the common law was defective; it was a substitute for the Statute of Edw. 6.

The Statute of Virginia speaks of any county, in Virginia, or elsewhere, as in the statute respecting conveyances. Virginia Law of 13th December, 1792, c. 90, § 5, p. 157, and 25th December, 1794, c. 179, § 1, p. 327.

The counsel agreed to save the point of law.

Verdict, guilty.

The COURT, upon consideration of the point reserved, was of opinion that as the death happened in St. Mary's county, in Maryland, although the fatal stroke was given here, the judgment must be for the prisoner, the offence not being complete within our jurisdiction. *Heydon's case*, 4 Co. 41, (a); *Horne v. Ogle*, 4 Co. 42, (b); 2 Inst. 318, 320; 3 Inst. 48, 49, 73.

The prisoner being also indicted for an assault and battery, was bound over to appear to answer to that indictment, and in the mean time to be of good behavior.

HODGSON v. WOODHOUSE.

TROVER will not lie against the master of a vessel for the cargo, unless the freight is paid, or tendered, or the payment waived; nor if the goods were lost so that they did not come to the use of the defendant.

TROVER against the master of a vessel for cheese and porter.

Mr. Taylor, for the defendant, prayed the Court to instruct the jury, that the plaintiff could not recover, unless he had paid or tendered the freight; — which instruction the COURT gave with a proviso that the jury should not be satisfied by the evidence that the defendant had waived the precedent condition of payment. *Ross v. Johnson*, 5 Burr. 2825.

Fry v. Yeaton.

The COURT, also, at the prayer of the defendant, instructed the jury, that if they should be of opinion that the cheese was eaten by the rats, or otherwise lost, so that it did not come to the use of the defendant, the plaintiff cannot recover in this form.

MARSTELLER v. M'CLEAN.

The Court will not permit the Statute of Limitations to be pleaded to an action of trespass for mesne profits after the rule-day, but upon payment of all antecedent costs and a continuance of the cause.

TRESPASS for mesne profits.

Mr. Taylor, counsel and attorney for the defendant, made affidavit that the plea of not guilty only had been entered in the office, without his knowledge or consent; that he did not attend at the rules when the plea was put in; and that he had been instructed by his client and always intended to plead the statute of limitations. It was admitted that the defendant had only appeared to the ejectment as guardian of Kirk, but by mistake he was not named as guardian.

Mr. Taylor, now offered to file the plea of limitations.

The COURT permitted him to file it, on payment of all antecedent costs and a continuance or postponement at the option of the plaintiff.

BIRCH v. SIMMS.

In slander, evidence of words spoken in the second person will not support an averment of words spoken in the third person.

SLANDER. The declaration was "he stole." The evidence was "you stole."

The COURT, upon the authority of *Rutherford v. Moore*, in Washington county, at December term, 1806, [*ante*, 388,] and the case of *Willis v. M'Kenzie*, in this county, July, 1808, (not reported) refused to suffer the evidence to go to the jury. Nonsuit.

FRY v. YEATON.

The fees of a magistrate in another State for taking a deposition under the Act of Congress of 1789, may be taxed in the bill of costs, in Virginia.

THIS was a motion by *Mr. C. Lee*, the plaintiff's counsel, to tax,

Bailey v. Sutton & Mandeville.

in the bill of costs, the fee of W. Wetmore, C. J., of the Common Pleas in Boston, being seven dollars, for taking a deposition according to the Act of Congress, (§ 30 of the Judiciary Act.) [1 Stat. at Large, 73.]

Mr. Youngs, for the defendant, contended that there was no law of Virginia, or of the United States, to authorize the charge.

Mr. C. Lee, for the plaintiff, cited the Virginia Act of 29th November, 1792, § 13, p. 279.

The COURT allowed the costs of taking the depositions to be taxed in the bill of costs.

WESTLEY STEWART v. DUFFEY.

The order of the Orphans' Court, to bind out an apprentice, is not a binding so as to constitute the relation of master and apprentice.

THIS was a petition of an apprentice against his master (a comb-maker,) praying to be discharged. There was an order of the Orphans' Court to bind him as orphan, but no indentures were ever executed.

Mr. Jones, for the petitioner, cited the Maryland law of 1793, c. 45, § 2. The books of the Orphans' Court are not a record. The entry is a mere memorandum of a verbal contract; it is not obligatory upon the master. It is not a binding out. The power of the Orphans' Court is a mere substitute for the power of the overseers of the poor, or of the parent or guardian.

Mr. Swann, on the same side. In the case of *Wilbar v. Mandeville*, the Court decided that such an order does not bind; and Wilbar's daughter was discharged from Mandeville.

Mr. C. Simms. The boy is an orphan, and the order may be complied with by executing the indenture. There was evidence of a verbal discharge by the master who sold out his shop, gave up his house, and went to Philadelphia.

The COURT discharged the boy on both grounds, viz. that there was no contract, and if there was, there was also a discharge.

BAILEY v. SUTTON & MANDEVILLE.

After the rule to plead has expired, the court will not compel the plaintiff to produce his cause of action.

ASSUMPSIT against the defendants as acceptors of a bill of exchange. The rule to plead expired on the third day of this term.

Mr. Youngs, for the defendant, moved to compel the plaintiff to produce his cause of action.

Refused.

THOMAS IRWIN v. THOMAS DUNLAP.

A subscribing witness to the execution of a deed may be compelled to attend court in Alexandria, to prove it.

A DEED had been executed by Dunlap and Irwin in presence of C. Lee, R. J. Taylor, and T. Swann.

C. Lee and R. J. Taylor had proved the execution of the deed. T. Swann refused to prove. Irwin obtained a subpoena for T. Swann to "testify, and the truth to say on behalf of Thomas Irwin, in relation to the execution of a certain deed by James Dunlap."

The subpoena being served, *Mr. Swann* stated that the deed was executed upon an understanding between the attorneys for both parties that Irwin should secure the purchase-money by a mortgage, and that the deed was delivered with that understanding; but Irwin now refuses.

The COURT was of opinion that a subscribing witness may be compelled to attend the court to prove a deed, so that it may be recorded.

BANK OF ALEXANDRIA v. JOSEPH MANDEVILLE.

The statute of usury applies to contracts of corporations, as well as to those of natural persons.

The Bank of Alexandria may, upon discounting notes, deduct the whole interest for the whole time they have to run.

THIS cause was argued at the last term by *Mr. Youngs* and *Mr. C. Lee*, for the defendant, and *Mr. E. J. Lee* and *Mr. C. Simms*, for the plaintiff; and again at this term by the same counsel for the plaintiff, and *Mr. Youngs* and *Mr. Swann*, for the defendant.

CRANCH, C. J., delivered the following opinion.

This is an action of debt brought by the Bank of Alexandria against Mandeville, to charge him as the secret partner of R. B. Jamesson, the maker of a promissory note for eight hundred dollars, payable sixty days after date, to the order of W. Herbert, in the Bank of Alexandria.

The defendant pleads,—

1. That on the 26th of May, 1806, it was corruptly agreed between the plaintiff and R. B. Jamesson, that the plaintiff should advance and lend R. B. Jamesson \$791.60, and should give day of payment thereof until 60 days from the 26th of May, 1806, and also 3 days of grace thereafter, and that R. B. J. should give his note therefor with W. Herbert, an indorser, for 800 dollars, dated the 26th of May, 1806, payable 60 days after date, which said

sum of \$8.40 was for the interest and profit therefor, and for giving day of payment of the said 800 dollars for the said 60 days and the said 3 days of grace, which said sum of \$8.40 exceeds the rate of 6 dollars for the interest of 100 dollars for one whole year, contrary to the form and effect of the statute in such case made and provided.

The plea then avers that the note was so made and indorsed, and the plaintiffs advanced and paid to R. B. J. the sum of \$791.60, by which the note, by force of the statute, is void in law, and this he is ready to verify.

2d plea. That on the 26th of May, 1806, it was corruptly agreed, &c., that R. B. J. should draw his note in the declaration mentioned in favor of W. Herbert, who should indorse the same, dated 26th of May, 1806, at 60 days after date, and the plaintiffs would pay him on the 27th of May, 1806, 800 dollars, upon condition that R. B. J. would, on the 27th of May, 1806, pay the plaintiffs the sum of \$8.40, as interest upon the \$800 for 63 days from the date of the note, which sum of \$8.40 was, on the 27th of May, deducted from the \$800, and the balance of \$791.60 on that day paid to R. B. J., which sum of \$8.40, the interest at 6 per cent. on 800 dollars for 63 days, for the loan of \$800 for 62 days exceeds the rate, &c.

3d plea. That it was on the 26th of May, 1806, corruptly agreed that the note should be drawn, &c., and that the plaintiffs would discount 800 dollars on account of said note, which should be held for the payment thereof at the expiration of the 60 days and the 3 days of grace, upon the express condition that the interest upon the 800 dollars for the 63 days, amounting to \$8.40, should be deducted from the 800 dollars, leaving the sum of \$791.60 to be paid to the said R. B. J., which sum of \$791.60 was, on the 27th of May, paid to R. B. J. by the plaintiffs. That only the sum of \$791.60 was actually loaned to R. B. J., and for the forbearance of the said \$791.60 for the 63 days the plaintiffs charged \$8.40, which said sum of \$8.40, the interest and profit charged for the loan and advance of \$791.60 for 63 days, exceeds the rate, &c.

Replication to the 1st plea. Protesting that it was not corruptly agreed, &c., as stated in the plea, that the plaintiffs should advance and lend to R. B. J. the sum of \$791.60, and should give day of payment, &c., and that R. B. J. did not in pursuance of such supposed corrupt agreement execute the note, &c., to be held by the plaintiffs for the payment of 800 dollars at the expiration of the said 63 days; and that the plaintiffs did not in prosecution of such supposed corrupt agreement, advance and pay, &c. For replication says that R. B. J. offered the note to the plain-

tiffs, according to the usage and custom of the said bank, indorsed by W. H., to be discounted by the plaintiffs according to the usage, practice, and custom of the said Bank of Alexandria, and all other banking companies. "And the plaintiffs aver that they did not in pursuit of any corrupt agreement, or of any illegal contract, but in pursuance of the legal custom, practice, and usage of the said bank, discount the said note, and did in pursuance thereof pay over to the said R. B. J. the said sum of \$791.60, detaining the sum of \$8.40 as the discount for the said sum of \$800 for 63 days, being at the rate of 6 per cent. per annum, as they might lawfully do; and this they are ready to verify."

To this replication there is a general demurrer, which admits the facts as stated in the replication, if they are well pleaded.

The question then is, whether those facts disclose an usurious transaction?

The facts stated in the replication are in substance: That R. B. Jamesson offered his note for 800 dollars, payable in 60 days after date, to W. Herbert's order, and by him indorsed according to the usage of the bank, to the plaintiffs, to be discounted by them according to their usage, and that of all other banks; and that the plaintiffs discounted it according to their usage, by paying to R. B. J. \$791.60, and detaining the sum of \$8.40 as the discount for the sum of 800 dollars for 63 days, being as they aver at the rate of 6 per cent. per annum.

At the time of the first incorporation of the Bank of Alexandria, the Virginia statute of usury had enacted "that no person shall hereafter, upon any contract, take directly or indirectly, for loan of any money, wares, or merchandise, or other commodity, above the value of £5 for the forbearance of £100 for a year, and after that rate for a greater or lesser sum, or for a longer or a shorter time; and all bonds, contracts, covenants, conveyances, or assurances hereafter to be made for payment or delivery of any money or goods so to be lent, on which a higher interest is reserved or taken than is hereby allowed, shall be utterly void." The 2d section imposes a penalty on any person who shall take, accept, or receive more than the interest thereby allowed. And by the 3d section, any borrower of money may exhibit a bill in chancery against the lender, and compel him to discover on oath, &c. This was the law in the year 1792, when the Bank of Alexandria was incorporated, and although the interest of money generally was then limited by law to five per cent., the bank was authorized "to receive for discounts made at the bank at a rate not exceeding six per cent. per annum." In May, 1797, the lawful rate of interest was raised by Act of Assembly to six per cent.

It is contended on the part of the bank that the transaction disclosed by the replication is not usurious, upon two grounds.

1. Because the statute of usury does not affect bodies politic and corporate.

2. Because the use, custom, and practice of all banking companies in discounting bills and notes is to take interest upon the nominal amount of such bills and notes, and not upon the sum actually loaned by way of discount; and the word discount in the charter of the bank is to be explained by reference to such usage, and not to the common arithmetical rule of discount. 1. In support of the first ground, that the statute of usury does not bind bodies politic, it is said that the statute is penal, and must be construed strictly. That the word person must be confined to natural persons, and although the act says that all bonds, &c., shall be void, yet it means all bonds, &c., made by such persons. But the Court is not of that opinion. The taking of exorbitant interest by great moneyed institutions and corporations, was an evil as much within the mischief intended to be remedied as if the same should be taken by a natural person; and when by the letter of the law all bonds, &c., are made void, we think it as much within the spirit of the act as within its letter.

The second ground on which the plaintiffs rest the legality of the transaction is more substantial. The question which it raises, is, whether the bank, in discounting this note for \$800 for sixty-three days, had a right to retain \$8.40 as the discount therefor. If the agreement stated in the replication be such as the bank was authorized by its charter to make, the question of usury cannot arise.

The preamble of the charter, (or rather of the Act of Assembly of Virginia, which incorporated the bank, and which has been decided by the Supreme Court to be a public act,) in enumerating the benefits expected from the establishment of such an institution, and the objects which the legislature had in view, says, "and by discount rendering easy and expeditious the anticipation of funds." That kind of discount, therefore, which would enable a person to anticipate his funds, was a transaction which the legislature intended to authorize.

In the body of the act, in section eighth, where certain powers are granted to the bank, it says, "and to receive for discounts made at the said bank, at a rate not exceeding six per cent. per annum." By allowing the bank to take six per cent. for discounts, when only five per cent. could be taken for interest on a loan, without taking notice of any repugnance between the two statutes, a strong presumption arises, that the legislature considered the discount by which funds could be anticipated, as a

transaction very distinct from a simple loan of money. But this presumption does not rest alone upon the circumstance that the legislature did not notice a repugnance between the two statutes. The distinction between an anticipation of funds by discount, and a loan of money upon interest, exists in the nature of things. Suppose I ship a cargo of flour to a merchant in Boston, who in payment remits me a bill of exchange at sixty days sight, upon a merchant in Alexandria, who accepts it. I wish to anticipate this fund. I apply to the bank to discount it. Do I ask for a loan? Do I wish to borrow the money? No. I am entitled to receive a sum of money at the end of sixty days, but I wish to anticipate the receipt of it. I wish to receive it now instead of then. The bank discounts this bill. If it were a loan from the bank to me, I should be the principal debtor, and the first person liable to the bank; but in truth by indorsing the bill to the bank, I become only a collateral and conditional debtor. The acceptor is the principal debtor to the bank, and to him must they first apply for payment; if not paid, they must protest, and give notice to me of the non-payment as soon as possible under all the circumstances, and if they neglect to demand payment from the acceptor, or to give me due notice of his non-payment, they have no claim upon me. Can this then be a loan of money from the bank to me? Nothing can be more different. I am only liable as the indorser of a bill. If it were to be considered a loan at all, it should rather be a loan to the acceptor, the principal debtor in the transaction. But it is not a loan to any person; it is a mere accommodation in shortening the time of payment. It was said, in argument, that the transaction must be either a loan of money or a purchase of the note, and that it could not be a purchase, if the vendor guaranteed the bill by indorsement, and that the bank was not authorized to trade in the purchase of bills, consequently it must be considered as a loan. This is clearly a *petitio principii*. It assumes the principle in dispute. There is a transaction which is neither a loan, nor a purchase of the note, and that transaction is discount. If it be not a loan, it cannot be the forbearance of a sum of money lent. If it be neither a loan nor the forbearance of a sum of money lent, it is not a transaction prohibited by the statute of usury.

A clear case, then, of mercantile discount, being the anticipation of funds, and not a loan of money, is not within that statute. Thus stands the case upon general principles of law and reason. Let us see how it stands upon authority.

But here let me repel a suggestion that this Court can set up the custom and usage of any trade or profession in England, or even in this country, in direct opposition to the express statutes of the

land. We disclaim any such power, and we disclaim all discretion in deciding a point of mere law. It has been said that in considering this question, we ought not to regard English authorities — that we are competent to make and expound our own laws. It is true that English authorities, as such, are not binding on the courts in this country. But no prudent man, who is to decide a question, will shut his ears to reason or argument, from whatever part of the world it may come. Upon the present question, I hold it to be not only our right, but our duty, to look into the decisions which have taken place upon questions of usury in England, especially decisions made prior to the date of the statute of usury in Virginia; because that statute is copied almost, if not exactly, *verbatim* from the English statute; and it is fair to conclude that the Virginia legislature, when they adopted the words of the English statute, meant to use them in the sense in which they were used in England; and as they had been explained and settled by judicial decision in that country, I hold it also fair to conclude that when the Legislature of Virginia were passing a law upon the subject of a banking institution, and used technical terms appropriate to the business of banking, they used them in the sense in which those terms were generally used among bankers, not only in this country, but in other parts of the world where that business is carried on. In order to ascertain in what sense such terms have been used, I deem it competent for the court to get information from the general history of a country, and especially from its judicial decisions.

In this point of view then, the Court feels itself bound to look into the English decisions, to see in what sense certain technical terms have been used in that country — and to see what cases have been considered as out of their statute of usury, from which ours is copied.

Let us then inquire whether a clear mercantile discount, being an anticipation of funds, and not a loan of money, is or is not usury under the English statute.

The first case which I find is that of *Barnes v. Worledge*, Noy, 41. This case was under the statute of Elizabeth, allowing ten per cent. The agreement was to pay five pounds for the first six months, and five pounds for the second six months, and it was adjudged no usury. “But by Popham, if the party had retained five pounds of one hundred pounds at the time of the leave, or that that five pounds was to have been paid before the six months, that clearly had been usury.”

Worley's case, S. C. Moore, 644. Popham, Gawdy, and Yelverton held, that although the loan was for a year, yet it was no usury to take half the interest at the end of half a year. “But it

is otherwise if one deducts the interest out of the principal at first."

Barnes v. Worlich, S. C. Cro. James, 26 Popham, Gawdy, and Williams, held the principal case no usury: But said "if he had agreed to take his money for the forbearance instantly when he lent it, that had made the assurance void; for then he had not lent the entire sum for one year, and the other had not had the use of his money according to the intention of the law. And Williams said he knew upon this difference it hath been so resolved of late time."

S. C. Yelverton, 30. In Yelverton, 30, it is said that the court was divided as to the principal case, two of the judges being of opinion that upon a loan for a year one half of the interest could not be received at the end of half a year—but he says, "if one hundred pounds be lent for a year, and the lender within two days following takes back ten pounds, this is usury."

So in *Dalton's case*, Noy, 171, it was said by Popham, "If a man lend £100 for a year, and to have ten pounds for the use of it; if the obligor pays the ten pounds, twenty days before it is due, that does not make the obligation void, because it was not corrupt. But if upon making the obligation, it had been agreed that the ten pounds should have been paid within the time, that should have been usury; because he had not the one hundred pounds for the whole year, when the ten pounds was to be paid within the year; and verdict was given accordingly."

In *Massu v. Daaling*, 2 Str. 1243, a note for two hundred pounds having three months to run was taken upon advancing one hundred and ninety-seven pounds, five per cent. per annum, being the legal interest; and at the end of the third month another note was taken for three months more upon the advance of three pounds for the other three months. LEE, C. J., held it to be usury.

In *Fisher, qui tam, v. Beasley*, Doug. 235, Grindall borrowed of Beasley £100, and gave bond payable in six months with lawful interest; but he paid down two guineas as premium. There was no doubt that this was usury, but the question was at what time the usury was complete, whether at the payment of the two guineas, or at the expiration of the six months. It was decided that the penalty was not incurred till the end of the six months when the interest was paid.

In the case of *Lloyd, qui tam, v. Williams*, 2 W. Bl. 792, De-Grey and Blackstone inclined to think, that if a man borrows £100 for three months, and immediately returns to the lender £6 5s. 0d. by way of interest by advance, the offence of taking more than legal interest is complete, and it is not to be considered as a loan of £93 15s. only.

This opinion of DeGrey and Blackstone, was against that of Gould. Nares gave no opinion.

There is in that case, a *dictum* of Judge Blackstone, "That interest may as lawfully be received beforehand for forbearing, as after the term is expired, for having forborne. And it shall not be reckoned, as merely a loan of the balance. Else, every banker in London who takes five per cent. for discounting bills, would be guilty of usury. For if upon discounting a £100 note at five per cent. he should be construed to lend only £95, then at the end of the time, he would receive five pounds interest for the loan of £95 principal; which is above the legal rate."

In *Gibson v. Fristoe*, 1 Call. 73, the Court of Appeals of Virginia, say, that if it be apparent to the court that the matter is usury, the jury need not find the agreement to be corruptly made; and that an agreement by which a man secures to himself directly or indirectly a higher premium than legal interest for the loan of money, is usury.

In *Floyer v. Edwards*, Cowp. Lord Mansfield says, "It depends principally upon the contract being a loan, and the statute uses the words 'directly or indirectly'; therefore in all questions in whatever respect, repugnant to the statute, we must get at the nature and substance of the transaction; the view of the parties must be ascertained, to satisfy the court that there is a loan and borrowing; and that the substance was to borrow on the one part and to lend on the other; and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. If the substance is a loan of money nothing will protect the taking more than five per cent.; and though the statute mentions only 'for loan of moneys, wares, merchandises, or other commodities,' yet any other contrivance, if the substance of it be a loan, will come under the word 'indirectly.'" Speaking of the practice of the particular trade, to take a half penny an ounce on certain goods if not paid for in a certain time, he says, "It is true the use of this practice will avail nothing, if meant as an evasion of the statute; for usage certainly will not protect usury; but it goes a great way to explain a transaction; and in this case is strong evidence to show that there was no intention to cover a loan of money. Upon a nice calculation it will be found that the practice of the bank in discounting bills exceeds the rate of five per cent., for they take interest upon the whole sum for the whole time the bills run, but pay only part of the money, namely, by deducting the interest first; yet this is not usury."

These were all cases of loan, and not of mercantile discount.

I can find no case in which it was ever made a question whether, in a clear mercantile discount, the taking in advance by

way of discount the whole interest, upon the whole sum, for the whole time the bill has to run, was within the Statute of Usury.

The cases which come nearest to that question, are those where the discount had been made in that manner, but the sum advanced was not all paid in cash, but partly in other bills having time to run, or in goods at a high price.

The circumstance that although usury was pleaded in those cases, it was not attempted to support it upon the ground that the interest was calculated upon the face of the bill, and not on the sum actually advanced, is good ground to infer that the whole court and bar considered such a transaction alone, not to be usury.

This inference is irresistible, when we reflect that as early as the year 1771, Judge Blackstone, uncontradicted by his brethren on the bench, in the case of *Lloyd v. Williams*, 2 W. Bl. 792, declared his opinion to be that bankers in discounting bills may lawfully receive the interest beforehand upon the whole amount of the bill; and when we find Lord Mansfield in the year 1774, in the case of *Floyer v. Edwards*, Cowp. 114, declaring from the bench, with the concurrence of the three other judges, that "the practice of the bank in discounting bills exceeds the rate of five per cent. for they take interest upon the whole sum for the whole time the bills run, but pay only part of the money, namely, by deducting the interest first; yet this is not usury."

The cases to which I alluded, as those in which the present ground for the allegation of usury existed, but was not relied upon, are, 1. *Benson v. Parry*, cited by judge Buller in *Auriol v. Thomas*, 2 T. R. 52. The question there was whether country bankers could take more than five per cent. on inland bills payable at another place; and it was decided by the Court of King's Bench unanimously that they might. No question was made whether it was usury for them to take five per cent.

2. The case of *Winch, qui tam, v. Fen*, cited by Buller in the same case; where the same question was decided; and no question made as to the five per cent. deducted.

3. The case of *Auriol v. Thomas*, 2 T. R. 52, in which the court says, "it is now clearly settled that the party is entitled to take not only £ 5 per cent. for legal interest, but also a reasonable sum for remitting and other incidental expenses." And Grose, J., says, "The line which has been taken is, that if the sum charged be not a color or a screen for usury, but is only fair and reasonable, it ought to be allowed."

4. The case of *Hammett and others v. Yea*, in the Court of Common Pleas, 1 B. & P. 144, which was this: Haviland made his promissory note payable to Yea, the defendant, at four months after date, for £ 3000, which Yea indorsed and returned to Havi-

land, who took it to the plaintiffs, who were bankers, to be discounted for the accommodation of Haviland, the maker of the note. The plaintiffs discounted it by deducting £ 50, being four months interest on £ 3000, and paying £ 2950, the balance to Haviland, partly in a draft having thirty days to run, partly by crediting Haviland in account, and the residue in cash; and this mode of payment was directed by Haviland or his agent.

These facts were relied on in the plea of usury. But the judge (EYRE, C. J.,) at the trial directed the jury that the charge of usury rested wholly on the plaintiffs having made no rebate of interest on the bill at thirty days which was paid to Haviland as cash, at the time of discounting the £ 3000 note; and left it to the jury to say whether it was a pretence to evade the statute. The jury found a verdict for the plaintiff; and on motion for a new trial, EYRE, C. J., says, "whether more than five per cent. be intentionally taken upon any contract for forbearance is a question of fact for the consideration of the jury, and must always be collected from the whole of the transaction." Again he says, "what is this case in matter of fact? Haviland applies to have his bills discounted to which the banker agrees, and calculates the interest upon the time the bills have to run, as is usual." "Had the banker told down the money, or tendered bank-notes, and had Haviland put them into his pocket, or swept them into his hat, and then said, but I want to send money to London, will you take part of my money back and give me bills? and the banker had accordingly done so and given these bills, I cannot see that there would have been any color for calling it an usurious transaction."

He here admits that the mode of calculating the discount and deducting it from the principal, upon discounting a bill or note, is the usual practice, and there is no color of usury in it. Again he says, "If all consideration of a loan were out of the case, a banker may lawfully take as much money as he can get for his bills without the least regard to the time they have to run." And again, "whether more than five per cent. be intentionally taken for the loan and forbearance of money is a question of fact to be decided by the jury." "It is for them to say whether it is a device or a fair agreement on good consideration."

HEATH, J., was of the same opinion. He says, "This was a transaction which commenced in discount and loan, and terminated in remittance. The subsequent transaction of remittance was no part of the antecedent contract; the bargain for the discount was complete." He considers the discount and loan clearly as a lawful transaction.

ROOKE, J. concurred.

We find the whole court unanimous, not only that the original

discount was lawful, but the subsequent payment in bills instead of cash.

5. The case of *Maddock, qui tam, v. Hammett*, 7 T. R. 184, which was decided in the King's Bench about six months before the case of *Hammett v. Yea*. The facts relied upon to support the usury, were that Haviland made his note to Yea, for £1000, at four months, who indorsed it. Haviland, the maker, took it to the defendants, Hammett and others, the bankers, to be discounted, who discounted it by paying in cash,

	£183	6	8
In bank-notes,	300	0	0
Draft on London, at 7 days sight,	500	0	0
	983	6	8
Retained for discount,	16	13	4
	£1000	00	0

The only usury relied on "was stated to consist in calculating the draft of £ 500 as cash, when it had seven days to run, instead of deducting so much from the discount, as the draft had to run before it became payable."

There the original discount of £16. 13s. 4d. was not contended to be usurious, although it was the interest of the whole £1000 for the whole time the note had to run.

6. The case of *Marsh v. Martindale*, 3 B. & P. 154. The facts of this case upon the plea of usury, were these, — Wood, in consideration of £3,500 paid by Marsh, had granted him an annuity of £500 per annum, redeemable upon certain terms. Wood applied to Marsh to redeem. And it was agreed that Wood should draw a bill of exchange for £5,000 at three years, which Marsh should discount. The £5,000 bill was accordingly drawn and discounted by Marsh as follows:

Original purchase of annuity,	£3,500	0	0
Arrears of annuity due,	333	6	8
For redeeming without notice, according to original agreement,	250	0	0
Cash paid to Wood,	116	13	4
	£4,250	00	0
3 years discount on £5,000, at 5 per cent.	750	00	0
	£5,000	00	0

In this case it was contended and decided that the discount of a bill for three years was not a transaction in the usual course of business, and afforded a strong ground, in connection with the circumstance of the annuity and a bond given immediately after the discount of the bill, to presume that the whole transaction was

a color for a loan and a cover for usury. And upon that ground the court set aside the verdict for the plaintiff, and ordered a nonsuit to be entered.

The principle decided by this case, was not, that in ordinary cases of discount the banker has not the right to deduct interest upon the whole amount of the bill for the time it has to run, but that in extraordinary cases, where the time the bill has to run is unusually long, that circumstance with others may be evidence of a mere contract for a loan, and an evasion of the statute.

The general principle is admitted by the counsel on both sides and by the court, that "it is lawful upon the discount of a bill of exchange to take interest upon the whole amount of the bill at the time when the money is advanced," but it was contended that this principle "must be confined to transactions upon bills in the ordinary course of trade." It was said that it "was too much to infer that because bills in the ordinary course of trade may lawfully be discounted in the manner above stated, a bill for any period of time may be discounted in the same manner."

Lord ALVANLEY, C. J., in delivering the opinion of the court, says, "it certainly has been decided that such a transaction on a bill of exchange in the way of trade, for the accommodation of the party desirous of raising money, is not usurious, though more than five per cent. be taken." "If therefore nothing more has been done in this case than has always been done by way of accommodation among merchants, the transaction was not usurious."

But he thinks that the discount of such a bill, (for three years) even not coupled with the transaction respecting the annuity, would have been almost sufficient to have afforded a presumption of usury; but coupled with the affair of the annuity and the bond, he thinks it appears to be a mere cloak for an usurious loan. He admits it to be completely established that, on the discount of bills, a banker may deduct more than the legal interest upon the whole sum for the whole time if the excess be only a reasonable compensation for the expenses and trouble of remittance. He concludes by saying that the only question in such cases is, "whether it be a real discount in the way of trade, or a mere loan of money." In the case then before him he is clear that "it was not a discount in the way of trade, but was merely employed as the means of obtaining more than legal interest."

7. In the case of *Parr v. Eliason*, 1 East, 92, a bill which had thirteen months to run was discounted. The bankers took the full discount, but gave their own acceptance at three months for part, without deducting from the discount the interest for three months upon their own acceptance. This was holden to be usurious, because they did not pay the amount in cash, but gave their own

acceptance at a distant day for part; it was not contended to be usurious, because the bankers deducted the interest upon the whole sum in the bill for the whole time it had to run, and no question of usury would have arisen if the amount had been paid wholly in cash.

8. The case of *Barclay, qui tam, v. Walmsley*, 4 East, 55, where the acceptor of a bill discounted his own acceptance at eighteen days, deducting at about the rate of sixty per cent. per annum. This was not usury.

These cases satisfy my mind that in England a case of mercantile discount, by way of anticipation of funds, is not a case of loan within their statute; and they are a strong confirmation of the general principles of law and reason which I have before mentioned. Principles in themselves so strong, and so universally adopted as not to have been once questioned in a nation so commercial as that of England, are not to be easily shaken. In a country adopting the same law of usury, and the same principles of commercial law, the same principles of law and reason must equally apply.

If then in this country as well as in England, a case of mercantile discount, by way of anticipation of funds, be not within the statute of usury, the question arises, is the case at bar a case of mercantile discount by way of anticipation of funds within the meaning of the charter of the bank?

It would be difficult in practice for a bank to know whether a note or a bill offered for discount be a note or bill grounded upon a *bonâ fide* mercantile negotiation of sale or contract. If the right of the bank to recover upon a bill or note discounted were to depend upon their being able to prove at the trial that the bill or note was given for a real debt, they would have a very hopeless business. They would be liable to continual impositions, and even although the paper might have been founded upon a real transaction, the parties might so conceal or remove the evidence as to render it impossible for the bank to succeed. Again, if the bank was obliged to investigate nicely every transaction before they could safely discount a note or bill, it would be almost impossible for them to transact any business at all. The burden of proof must in reason rest upon the other party. It is sufficient for the bank that the paper offered bears the form and appearance of a mere mercantile negotiation.

Nor do I deem it necessary within the spirit of the charter of the bank that a note to be lawfully discounted by the bank should be a note given in consequence of an actual sale of property. If one merchant chooses to give a credit to another, (whether gratuitously, or in consideration of a commission or other compensa-

tion,) by accepting bills, or drawing or indorsing notes payable at a distant day; such credit may strictly, in mercantile language, be called funds; and the discount of such acceptances, or such notes, is as much the anticipation of funds, as if the acceptances or notes were founded upon an actual sale of property. Again, if I have sold property, either verbally or by covenant under seal, the contract is not in such a form as to be the subject of discount. I get a friend who has confidence in that fund to accept my bills, or to indorse my notes, so as to enable me to anticipate that fund. Such acceptances and such notes would be clearly within the spirit of the charter of the bank, and would be fairly within the meaning of a mercantile discount by way of anticipation of funds, and the discount of such acceptances, or notes, could not be considered as a loan from the bank to me. If it can in any way be considered as a loan, it must be a loan from my friend who enables me to get the money on his acceptances.

What then is the case presented to us by the replication? Does it bear the form and appearance of a mercantile negotiation, by way of anticipation of funds? It is simply a note for eight hundred dollars by R. B. J., and indorsed by W. Herbert, payable at sixty days after date. The note in every respect has the usual appearances of a fair transaction, and there is no fact stated to show that it was not. The bank then had a right to presume it was so, and the Court must so consider it until the contrary appears.

Considering it then as a case of mercantile discount by way of anticipation of funds, I deem it a case clear of the statute of usury, and within the charter of the bank.

But an objection is made and strenuously insisted upon by the counsel of the defendant, that even if the bank has a right to deduct a discount at the rate of six per cent. per annum, upon the face of the note for the whole time it has to run, yet they have agreed by this note to take more than at that rate.

It is said that \$8.40 upon \$800 is at the rate of six per cent. per annum for sixty-three days and six tenths of a day, and they make it out by saying that sixty-three days is not two months and one tenth of a month, but is sixty-three three hundred and sixty-fifths of a year, that is, they do not allow that a month is to be considered as the twelfth part of a year, nor a day the thirtieth part of a month. The replication avers that \$8.40 for the discount of a note of 800 dollars is at the rate of 6 per cent. per annum, and whether it be or not I take to be a matter of fact for the jury, and not for the Court. It is for the jury to say what is the usual mode of calculation in such cases, and to calculate accordingly. If, however, it were a matter of law, and not a matter of fact, I

Jamieson v. Willis.

should most certainly calculate it according to the mode in which the clerks in the bank calculated it, because I know that to be the general, I may almost say the universal, mode of calculation, not only among bankers and merchants, but in our courts of justice. But if it were an error, I should leave it to the jury to say whether it were not a mistake; and not done with an intent to make more than the lawful discount.

Upon these grounds, I am satisfied that the transaction in the replication is not usurious, nor the note void.

Judgment upon the demurrer for the plaintiff.

JAMES YOUNG v. MARINE INSURANCE COMPANY of ALEXANDRIA.

If a juror in a civil cause be taken suddenly ill, the jury may be discharged, and the cause may be continued to the next term.

IN this case the jury had been out three days and two nights without separating, or agreeing, and on Friday last, the Court finding them in a state of fixed disagreement, allowed them, (with the assent of the counsel for the defendants, and with an intimation on the part of the plaintiff's counsel that no advantage would be taken by the plaintiff, but he would not consent,) to separate until Monday, (this day) having charged them to hold no conversation with any person out of court upon the subject of this suit.

This morning Dr. Dick, a physician, came into court, and stated that one of the jurymen (Mr. Mandeville) was too ill of a bilious attack to attend without danger to his life, and he did not think he would be able to attend for several days. The Court having sat four weeks, and expecting to rise this week, and it being stated by the other jurors that there was no probability that they could agree, and the jury being called, and Mr. Mandeville not appearing, the Court discharged the other jurors and continued the cause.

JAMIESON v. WILLIS.

Notice of taking a deposition in Alexandria between 9 A. M. and 2 P. M., served by leaving a copy with the wife, at half past 8 A. M., and delivering another copy to the party at market, is not reasonable, although the parties all reside in Alexandria.

ASSUMPSIT for goods sold and delivered.

The plaintiff offered a deposition of John Gird, who was about to go to sea, taken in Alexandria under the Act of 1789, § 30.

Irving v. Sutton.

Mr. E. J. Lee, for the defendant, objected that the notice was not reasonable.

The writ issued 26th of May, 1808. The notice was dated the 27th of May, to appear on the same day, in Alexandria, between 9 and 2 o'clock. It was served by leaving a copy with Mrs. Willis at half past eight o'clock, A. M., on the 27th, and a copy was offered to the defendant at the market, on the morning of the 27th.

Mr. Herbert and *Mr. Swann*, for the plaintiff, offered evidence that the deposition was not in fact taken till half past ten o'clock, A. M.

The COURT was of opinion that such notice was not reasonable, although the parties resided in Alexandria. Nonsuit.

Reinstated on payment of all costs and leave to both parties to amend.

ISH v. MILLS.

Notice to the indorser, of non-payment of a promissory note, not payable to order, is not necessary in Virginia.

Due diligence is a question for the jury.

ASSUMPSIT against the indorser of Barnes & Holly's promissory note, not payable to order. The note became payable on the 21st of February, 1806. The plaintiff brought his suit against Barnes & Holly, on the 17th of May, 1806. Execution was issued in August, 1807. Barnes took the oath of an insolvent debtor in July, 1806, and Kelly in December, 1807. This action was brought against Mills on the 2d of July, 1808.

Mr. E. J. Lee, for the defendant, relied on the want of diligence in not giving notice to the defendant of the non-payment by Barnes & Holly.

The COURT was of opinion that notice to the indorser of a promissory note, not negotiable, is not necessary in Virginia. The obligation of the indorser of such a promissory note in Virginia is that if the holder cannot, by using due diligence, obtain payment from the maker, the indorser will pay at all events, whether he had notice or not, and that due diligence is a question for the jury.

The defendant took a bill of exceptions, but did not prosecute a writ of error.

IRVING, Assignee, v. SUTTON.

If the holder of an accepted bill of exchange be beyond seas at the time his cause of

Gilpin v. Oxley.

action accrues, and so continues till suit brought, the statute of limitations is no bar, although the indorser always was a resident of the United States.

DEBT on the acceptance of a bill of exchange, at three months, for £245 10s. 6d. sterling, by indorsee against the acceptor. The defendant pleaded the statute of limitations of five years.

Replication, that the plaintiff when his cause of action accrued, resided, and has continued to reside beyond seas.

Rejoinder, that at the time of the indorsement, and for five years next before, the indorsers were and continued to be residents of the United States.

General demurrer and joinder.

Mr. N. Herbert, for the defendant, contended that as this is an American bill, the assignment to a foreigner cannot take the case out of the statute of limitations.

The COURT said the rejoinder was bad, and rendered judgment for the plaintiff on the demurrer.

GILPIN, Judge of the Orphans' Court, v. OXLEY and Sureties.

An action will not lie against the sureties in an administration bond, until the plaintiff shall have proved his debt and a *devastavit*, in an action against the administrator.

DEBT on an administration bond against the administrator of Henley and his sureties.

The breach alleged is the non-payment of two promissory notes made by Henley.

Mr. Taylor, for Murgatroyd, one of the sureties, prayed the Court to instruct the jury that no suit can be supported against the sureties, until the debt has been established by a suit against the administrator, and *nulla bona* returned upon an execution *de bonis testatoris*. *Braxton v. Winslow*, 1 Wash. 31.

Mr. E. J. Lee, contra. The object of the bond is to secure creditors. If the administrator runs away, the plaintiff can get no judgment against him. And if his sureties are not liable, he will have no remedy. The sureties may require counter security. In *Braxton v. Winslow*, the suit was against the sureties only. The executor was not a party to the suit. In *Turner v. Chinn's Executors*, 1 Hening & Munford, 53, the Court of Appeals say the question is not decided; and they leave the question open, whether the return, that the executor had removed to Kentucky, was sufficient to charge the sureties. As to guardians' bonds, there is no such decision. *Call v. Ruffin*, 1 Call, 333.

The COURT stopped *Mr. Taylor* in reply, considering the point as settled by the Court of Appeals in Virginia. Nonsuit.

HODGSON v. THE MARINE INSURANCE COMPANY.

The Court will not permit a defendant to tender an issue which he had refused to join, and to which he had demurred when tendered by the plaintiff; there having been judgment rendered against him by the Supreme Court on the demurrer.

THE COURT refused the ninth plea now offered by the defendants, because the substance of it was tendered as an issue, by the plaintiff in a former stage of the suit, and rejected by the defendants, who chose to demur; and having had judgment against them in the Supreme Court on the demurrer, ought not now to be permitted to amend.

 SNOWDON v. LINDO.

It is a libel to print and publish these words, "He is a lying, slanderous rascal;" and it is no justification, that the plaintiff had stated what was not true, unless he had stated it maliciously.

CASE for libel — for printing and publishing these words of the plaintiff, "He is a lying, slanderous rascal."

The defendant pleaded, in justification, that the plaintiff had untruly published that the dinner was given to Mr. Lewis for his public services, when in truth it was given for his service to the town of Alexandria. The plea did not aver that the plaintiff maliciously, as well as falsely, published, &c.

Demurrer and joinder.

Mr. C. Lee, for the plaintiff. Words written and published are actionable, which would not be, if spoken only. Any words written and published, throwing contumely on the party, are actionable. *Villers v. Monsley*, 2 Wils. 403; *Bell v. Stone*, 1 B. & P. 331; Bull. N. P. 8; Esp. N. P. 260.

Mr. Swann, contra. The declaration is bad; the words "lying, slanderous rascal," although printed and published, are not libellous and actionable. But if the declaration is good, the justification is good.

The COURT rendered judgment on the demurrer for the plaintiff.

 DE BUTTS v. BACON *et al.*

At the hearing of a cause in chancery, the Court will not receive *vivâ voce* testimony unless to prove an exhibit.

Mr. Swann, for the plaintiff, offered, at the hearing, to prove
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certain papers not made exhibits; and cited the 30th section of the Judiciary Act of 1789. [1 Stat. at Large, 88.]

The cause was set for hearing upon the bill, answer, replication, exhibits, and depositions.

Mr. C. Lee stated it to be the practice in the federal courts to examine witnesses at the hearing, and to have the evidence taken down in writing by the clerk.

Mr. Youngs, contra. Where the evidence has been taken in the usual mode by commission, and the cause set for hearing, no evidence taken afterwards can be received unless by consent or the special order of court. Virginia law, 1792, November 29, § 46, p. 67; 1 Har. Ch. Pr. 595.

The COURT refused to suffer *vivâ voce* testimony to prove a letter, produced by the plaintiff at the hearing, not being an exhibit referred to by the bill or answer.

The Court had some doubt upon the 30th section of the Judiciary Act of 1789, but as the practice both here and in Maryland has been not to receive the testimony at the hearing, and having so decided in the case of *Harper & Lyles v. Marine Insurance Company*, at the last term, in a full court, they rejected the testimony. See the 12th Rule of practice in this Court.

BUTTS v. CHAPMAN.

When costs are given, on leave to amend, the payment of the costs is not a condition precedent.

THE COURT, (having since July, 1807, decided in suits at law that when an amendment is allowed on payment of costs, the payment of costs is not a condition precedent, but may be enforced, or await the event of the suit,) — decided, in this case, that the amended answer should be received although the costs were not paid, and thereby overruled the decision made in this suit at July term, 1807.

CIRCUIT COURT OF THE UNITED STATES.

NOVEMBER TERM, 1809, AT ALEXANDRIA.

PATTERSON'S EXECUTORS *v.* BALL & BOWIE.

If the plaintiffs dismiss their bill because they are not competent to sue as executors in the District of Columbia; a lawyer's fee may be taxed against them.

ATTACHMENT in chancery. The defendants had by answer denied that the plaintiffs were executors in the District of Columbia. The plaintiffs thereupon dismissed their bill.

Mr. Youngs, for the defendants.

Mr. Swann, for the plaintiffs.

The COURT was of opinion that a lawyer's fee should be taxed against the complainants, although they styled themselves executors. The defendants having denied that they were executors, have thrown the burden of proof on the plaintiffs. And by dismissing their bill they have tacitly admitted that they were not competent to sue here as executors. See Virginia law of 19th November, 1792, § 14, p. 98.

UNITED STATES *v.* JOHN PEYTON DULANY.

The prosecutor must give security for costs.

Mr. Youngs, for the defendant, moved to stay the trial until the prosecutor give security for costs according to Rule No. 29, in the Rule-book: The prosecutor (*Dr. Spohn*) having removed from the district and having no property. Granted.

UNITED STATES *v.* JAMES BIRCH.

The prosecutor, whose name is indorsed on the indictment for a misdemeanor, is not a competent witness for the prosecution.

A selling by the wife with the assent of the husband, is a selling by the husband. The day is not material.

INDICTMENT for selling spirituous liquors without license.

 Offutt v. Hall.

Alexander Simms, the prosecutor, whose name was indorsed on the indictment, was offered, by the United States, as a witness.

Mr. E. J. Lee, for the defendant, objected that he was interested ; being liable to pay the costs, according to the Act of Virginia, of 13th November, 1792, § 25, p. 105.

Mr. Jones. It is every-day's practice in England to examine prosecutors.

The COURT said that the interest was direct and that the witness was incompetent.

Mr. E. J. Lee contended that evidence that the defendant's wife sold, is not evidence that the defendant sold, and that the day must be proved as laid.

The COURT said, if the selling by the wife was with the assent of the husband, it is to be considered as the selling by the husband.

Mr. Lee abandoned the point as to the day.

But the COURT thought the day was not material.

 OFFUTT v. HALL.

A count upon a promise to pay the debt of another in a certain event, must aver a consideration.

An averment that the defendant put his name on the back of a note with intent to give it credit, and to induce the plaintiff to accept the same, and that the note so indorsed was delivered to the plaintiff for a full and valuable consideration, is a sufficient averment of a consideration for the promise.

Insolvency of the maker, in Virginia, dispenses with suit and demand and notice.

ASSUMPSIT. Verdict for the plaintiff, at November term, 1808, on the three first counts, and for the defendant on the last count.

Motion in arrest of judgment.

1. Because the undertaking, set forth in the counts upon which the verdict is taken, is void in law.

2. Because the declaration does not aver that payment of the note was ever demanded of Henderson & Co.

3. Because the declaration does not aver that the defendant had notice of the non-payment of the note by the makers.

4. Because the whole proceedings and verdict are informal and insufficient in law.

The 1st count of the declaration. Whereas on the 17th of September, 1803, Alexander Henderson & Company, by their note in writing, promised to pay to the plaintiff, or order, \$625.95 in one hundred and twenty days after date, for value received. And the defendant afterwards, the same day, by his writing, indorsed upon the back of the said note and by him subscribed, did pro-

mise the plaintiff that he would pay the plaintiff the amount of the said note in case the said H. & Co. should fail to pay the same and should be insolvent when it became due as aforesaid. And the plaintiff in fact saith that the said A. H. & Co. altogether failed to pay the said note when it became due as aforesaid, and were altogether insolvent when the note became due as aforesaid, namely, on the 17th of January, in the year aforesaid. (1803.)

By means whereof the defendant became liable and bound to pay the plaintiff the amount of the note as aforesaid, and being so liable, in consideration thereof afterwards, &c., promised to pay the amount of the said note on demand.

2d count. And whereas H. & Co. on the 17th of September, 1803, in consideration that the plaintiff had sold and delivered to the said H. & Co. a quantity of tobacco, promised to deliver to the plaintiff their promissory note for the same with an indorser upon the said promissory note. And the plaintiff in fact saith that H. & Co. in pursuance of their said promise, namely, on the at did pass to the plaintiff their promissory note by them subscribed, whereby they promised to pay to the plaintiff, one hundred and twenty days after date, \$625.95 value received, which said promissory note after being so made as aforesaid, H. & Co. presented to the defendant for his indorsement, who indorsed it, by which indorsement he promised the plaintiff to pay him the amount of the said note in case H. & Co. should be insolvent when it became due, and should fail to pay the same. And the plaintiff in fact saith that H. & Co. were insolvent when the said note became due, and altogether failed to pay the same or any part thereof to him. By means whereof the defendant became liable and bound to pay the plaintiff the amount of the said note, and being so liable, in consideration thereof, &c., promised to pay on demand.

3d count. And whereas also, H. & Co. on the 17th of September, 1803, at &c., by their certain writing commonly called a promissory note, by them subscribed, promised to pay the plaintiff, one hundred and twenty days after date, \$625.95, for value received, and the defendant afterwards, on the same day, at &c. to give a credit to the said note and to induce the plaintiff to accept the same, did by his certain writing indorsed on the back of the said note with his proper hand and name thereto subscribed, promised to pay to the plaintiff the amount of the said note in case the said H. & Co. should fail to pay the same, and should be insolvent at the time it became due as aforesaid, which said note so indorsed as aforesaid, was delivered by the said H. & Co. to the plaintiff for a full and valuable consideration. And the plaintiff in fact saith that H. & Co. failed to pay to the plaintiff the

said note or any part thereof when it became due as aforesaid, and were at that time altogether insolvent, in consequence of which the defendant became liable and bound to pay to the plaintiff the amount of the said note, and being so liable, in consideration thereof afterwards, &c. promised to pay on demand.

CRANCH, C. J., after stating the substance of the three first counts, delivered the opinion of the Court, as follows.

These are the counts upon which the verdict is taken. The two first are bad, because they aver no consideration for the written promise contained in the indorsement. The third count avers that the defendant indorsed the note to give it credit and to induce the plaintiff to accept the same, and that the note so indorsed was delivered to him by H. & Co. for a full and valuable consideration. If a consideration be necessary to support an action upon a promise made for such a purpose and under such circumstances, it is supposed that the circumstances themselves will amount to a good consideration in law. This point seems to be decided by the Supreme Court in the case of *Violett v. Patton*, 5 Cranch, 142. Two other questions, however, occur upon this count.

1. Whether the defendant was liable to an action before demand of payment had been made of H. & Co., and

2. Whether the defendant was liable before he received notice of the non-payment.

Or in other words, whether the insolvency of H. & Co. at the time the note became payable, is an excuse for the omission to demand payment from them, and to give notice to the defendant.

In the case of *Ish v. Mills*, at the last term, [*ante*, 567,] this Court decided that the indorser of a promissory note not negotiable, was not, under the Virginia law, entitled to notice; and it was there said that the undertaking of such an indorser was only to pay if the holder, after using due diligence, should fail to recover it from the maker; but that if due diligence has been unsuccessfully used, the indorser becomes absolutely liable, whether he had notice or not, of the steps which the holder had taken to compel payment from the maker.

It is not supposed necessary to state in the declaration, all the steps which the plaintiff has taken to compel such payment, and which amount to due diligence. Is it necessary to state any of them? If suit has been brought against the maker, is it necessary in any case to state it in a declaration against the indorser? If insolvency of the maker be averred, it is certainly not necessary to aver that a suit has been brought, because the insolvency dispenses with the necessity of a suit. If insolvency of the maker be averred, is it necessary to aver a demand from the maker? I

Bank of Alexandria v. Mandeville.

think not. For if a suit would be unavailing, *à fortiori* would be a demand. The same reason which would dispense with a suit in case of insolvency will dispense with a demand. And if a demand be not necessary, it cannot be necessary to aver it. It is no objection therefore to this declaration that it does not aver a demand of payment from Henderson & Co. And if a demand be unnecessary, it cannot be required that the defendant should have notice of a demand.

Upon the whole, then, we think the third count can be supported; and, as by the Virginia law the judgment cannot be arrested if there be one good count, judgment ought to be rendered for the plaintiff upon the third count.

 IRVING v. SUTTON.

Notice of a motion for a *dedimus* to take depositions in a foreign country may be given to the attorney at law.

Mr. N. Herbert, for the defendant, moved for a commission to take depositions of witnesses residing in England. Notice of the motion had been served on *Mr. E. J. Lee*, the attorney at law of the plaintiff, who resided in England.

Mr. E. J. Lee objected, that the notice under the Act of Virginia, 29th of November, 1792, § 13, p. 279, ought to be given to the party himself or his attorney in fact, or agent, *Buddicum v. Kirk*, 3 Cranch, 297.

The Court was of opinion that notice of the motion may be given to the attorney at law.

The opinion of Marshall, C. J., in *Buddicum v. Kirk*, is extrajudicial — a mere *dictum* — and relates to the notice of the time and place of taking the deposition, not to notice of the motion for a commission.

 BANK OF ALEXANDRIA v. MANDEVILLE.

An action of debt, under the Virginia law, may be maintained upon a promissory note, against a secret partner who has not signed it.

A creditor of the firm is a competent witness to prove its existence.

The wife of one of the defendants is not a competent witness for the plaintiffs, although her husband has been discharged under the Insolvent Act.

A stockholder in a company who own stock in the plaintiffs' bank is a competent witness for the plaintiffs.

The record of other suits between the defendant and other plaintiffs cannot be read in evidence by the plaintiffs to show fraud in the dissolution of the partnership.

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The secret partner is not liable unless the money obtained by the discount of the note came to the use of the secret partnership.

DEBT on a note signed by R. B. Jamesson, charging Mandeville as a secret partner.

1st plea, *nil debet*.

2d plea, usury, upon which there was a demurrer and judgment at the last term.

3d plea, usury. Replication, it was discounted by the bank according to their usage; general rejoinder and issue.

4th plea, usury; same replication as to 3d plea; rejoinder, did not offer the note for discount according to the usage of the Bank of Alexandria and all other banks in the United States; upon which issue was joined.

Mr. C. Lee, for the defendant, objected to the note going in evidence. The action is debt on the promissory note. Debt does not lie on a promissory note at common law. This action is supposed to be founded on the Virginia statute of December 4th, 1786, p. 36, § 3. The declaration upon a note given for account of Jamesson & Mandeville. This note does not state it to be on account of J. & M., and parol evidence cannot be given to prove that fact. The statute of Virginia gives an action of debt only against the person who signed the note. The action ought to have been *assumpsit*. The first count of the declaration states that R. B. Jamesson for and on account of Jamesson & Mandeville, by their note promised to pay, &c. The second count, that Jamesson & Mandeville, by their note promised to pay.

Mr. C. Simms and *Mr. E. J. Lee*, for the plaintiffs.

The note is precisely such an one as is declared upon. If it will not support an action against Mandeville, it is a good cause for demurrer—and that is the course they ought to have taken. It is now too late.

One partner may bind his copartner by a note. So the acceptance of one partner binds all, if on partnership account. If the note had been signed by one partner only for himself and partners, an action of debt under the statute might have been maintained upon it against all the partners. The statute means that an action of debt may be brought against any person bound by the note.

The question is, who signed the note; we say that Mandeville & Jamesson signed it by R. B. Jamesson. The question then arises whether Mandeville & Jamesson traded under the firm of R. B. Jamesson. If you take the statute literally, only one of a mercantile firm (he who signed) is liable to an action of debt. Suppose it had been R. B. Jamesson and Co., we might show who the company was.

Mr. Swann, in reply. We cannot deny the consideration in an action of debt, on the statute.

Here is no ambiguity either latent or patent. If the term *company* had been added, there would have been ambiguity which might have been explained.

In *assumpsit* we can go into the consideration.

The COURT was of opinion that there was no variance between the note declared upon and that offered in evidence; and that parol evidence was competent to prove the averment of partnership and the averment that the note was given by R. B. Jamesson, for and on account of the copartnership. If an action could not be maintained against Mandeville under the statute, because he had not signed the note, it was a defect apparent on the face of the declaration, and the remedy was by demurrer, or arrest of judgment.

The deposition of one Grogan was offered in evidence by the plaintiffs.

Mr. Youngs, *Mr. C. Lee*, and *Mr. Swann*, for the defendant, objected, that Grogan states himself to be a creditor of R. B. Jamesson, and is interested in fixing the partnership upon Mandeville.

The COURT, without argument, said that it was an objection to the credibility, but not to the competency of the witness; although Jamesson is insolvent, and has been discharged under the insolvent act.

The plaintiffs offered the wife of R. B. Jamesson, one of the defendants, to charge the other defendant as a secret partner of her husband.

Mr. E. J. Lee. R. B. Jamesson himself would be a good witness, having been discharged under the insolvent law. In the case of *The Mayor &c. v. Moore & sureties*, [ante, 193,] Moore was admitted as a witness. In the case of *The Governor of Virginia v. Evans et al.* [post, 581,] Evans was admitted a witness; and in the case of *Riddle & Co. v. Welch & Moss*, Welch was admitted as a witness. The interest must be direct in the event of the suit in trial. 3 Williams's Cases, 398; *Bent v. Baker*, 3 T. R. 27. If the verdict or judgment cannot be used in his favor, he is a competent witness. So the wife is a good witness against the husband. *Williams v. Johnson*, 1 Str. 504; *Anonymous*, 1 Str. 527; *Rex v. Agire*, 1 Str. 633; *Baring v. Reeder*, 1 Hening & Mun. 154.

The COURT refused to suffer Mrs. Jamesson to testify; her husband could not be a witness directly to fix a liability upon Mandeville; and she has all his disabilities.

In the case of *The Mayor &c. v. Moore et al.*, Moore had been discharged under the bankrupt law, and was not liable. In

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the case of the *Governor of Virginia v. Evans et al.*, Evans was permitted to prove a collateral matter in the issues joined on the pleas of the other defendants. So in *Riddle & Co. v. Welch & Moss*. Here the evidence is to create the liability itself directly.

Thomas Vowell, Jr., was offered as a witness for the plaintiffs. The defendant objected that he was interested, being a stockholder in the Marine Insurance Company, which company is a stockholder in the Bank of Alexandria.

The COURT, without argument, overruled the objection, on the authority of the *Common Council v. Brockett* in this court at November term, 1807, [*ante*, 505,] considering it as a doubtful point. The plaintiffs offered to read the records in sundry suits in which Mandeville was a party about the time of the supposed dissolution of the firm of Mandeville & Jamesson, in which Mandeville's discharge under the English bankrupt law was questioned, to show a motive for an ostensible dissolution.

But the COURT (CRANCH, C. J., doubting,) refused.

Mr. C. Lee then moved the Court to instruct the jury that the defendant is not liable unless the money obtained by the discount of this note came to the use of the secret partnership, —

Which instruction the Court gave.

Mr. R. J. Taylor, for the plaintiffs, prayed the Court to instruct the jury that if the note was discounted for the use of the partnership, and received by R. B. Jamesson, one of the partners, the plaintiffs are entitled to recover, although the plaintiffs were at the time ignorant of the existence of the partnership, and discounted it on the credit of R. B. Jamesson and W. Herbert, the indorser, and although the money was applied by R. B. Jamesson to his own individual use, and not to the use of the partnership, —

Which instruction the Court refused to give.

Mr. Swann, for the defendant, prayed, and the Court instructed the jury that if the partnership was actually dissolved between Mandeville & Jamesson on the 10th of June, 1806, and did not exist on the 21st of July, 1806, (the date of the note) and the dissolution was known to the bank before that day, the defendant is not bound to pay it, although it was given to take up a partnership note.

POMERY v. SLACUM.

A Virginian, indorser of a bill of exchange drawn in Barbadoes, is liable to fifteen per cent. damages.

Notice of the protest must be given before suit brought.

DEBT against the indorser of a bill of exchange drawn by Cado-

Marsteller v. McClean.

gan, at Barbadoes, in favor of the defendant, on merchants in England, indorsed by the defendant to the plaintiff in Alexandria, but not accepted nor paid.

Mr. Swann, for the defendant, contended that the defendant is not liable to the fifteen per cent. damages under the Act of Assembly of the 12th November, 1792, p. 113. The act means bills drawn in Virginia. The defendant is not liable for more than he can recover from Cadogan. He becomes liable only as the drawer is liable, his responsibility follows the nature of that of the drawer, it is governed by the *lex loci* where the original contract was made.

Mr. Taylor, contra. The words of the Act of Assembly are general and apply to bills drawn anywhere, so far as to bind any person who draws or indorses a bill in Virginia. It is a new contract.

Mr. Swann, in reply. The act is an old act, made when the trade was carried on here by factors who advanced money to the planters and took their bills. The indorser is only a security; he is liable for whatever the drawer is liable for, and no more. The value in current money is not stated in the indorsement.

The COURT was of opinion that the indorser in Virginia is liable to the fifteen per cent. damages, although the bill was drawn in Barbadoes, where the damages are only ten per cent.

The Court also instructed the jury that it is necessary that they should be satisfied that the plaintiff had reasonable notice of the protest for non-payment before the suit brought. It is a necessary part of the plaintiff's cause of action.¹

MARSTELLER *et al.* v. McCLEAN.

The disability of one joint plaintiff does not take the case out of the statute of limitations.

TRESPASS *quare clausum fregit* for mesne profits. The defendant pleaded the statute of limitations. Replication, infancy of some, and coverture of others of the plaintiffs; but Marsteller and some of the plaintiffs were under no disability.

As to them, *Mr. Taylor*, for the defendant, contended that the replication is no answer to the plea. All the plaintiffs sue in their own rights, and as joint tenants, or tenants in common. There is

¹ The opinions of this court in this case were affirmed by the Supreme Court of the United States, 6 Cranch, 221, although the judgment was reversed for a defect in the declaration, not noticed in this Court.

Henry's Ex's. v. Ricketts, Newton, & Co.

no difference between the case of joint tenants of goods and joint tenants of land. If the plaintiffs were joint merchants, and some of them out of the country and others in, the action must have been brought within five years. *Perry v. Jackson*, 4 T. R. 576. The promise of one joint defendant takes the case out of the statute as to all. It is not necessary that the infants and *femes covert* should join in the action. They might be summoned and severed.

Mr. C. Simms, on the same side. This is trespass for mesne profits. Those plaintiffs who were competent to sue cannot avail themselves of the disabilities of the others. Nor can those who by themselves would be under the disability, claim an exemption from the statute, if they join with those who were able to sue. It is not necessary that the wives should be made parties, the husbands were competent to sue alone for a trespass.

Mr. E. J. Lee, contra. It appears by the whole declaration that the husbands sue in right of their wives. The tracing of the title up to Richard Arrell shows it. It is not averred that they sue in their own right. The husbands are parties only *pro formâ*. The replication goes to all the parties really interested. The wives would be entitled to the action if their husbands should die.

Wherever the husband sues in right of his wife she must be joined.

Mr. Simms, in reply. The right of action is in the husband alone, it is for a trespass upon his possession. In the case of a bond given to a *feme* while sole, the right of action is in the wife.

The COURT were of opinion that the replication of coverture as to some of the plaintiffs, and of infancy as to others, is not a good replication to a plea of the statute of limitations.

Where adults and infants have a joint right of action for trespass, the incapacity of the infants shall not avail the adults so as to avoid the statute of limitations.¹

HENRY'S EXECUTORS v. RICKETTS, NEWTON, & CO.

The Court will not, in a civil suit, attach a witness who resides more than one hundred miles from the place of trial, nor issue a subpoena commanding him to go and testify before a magistrate.

Mr. R. J. Taylor, for the defendants, moved for a rule on James Taylor to show cause why an attachment should not issue against him for a contempt in not obeying a summons to appear and testify as a witness, and to bring with him certain papers.

¹ Judgment affirmed in the Supreme Court of the United States, 7 Cranch, 156.

Governor of Virginia v. Evans.

The witness resided in Norfolk, Virginia, more than one hundred miles from the place of trial.

The COURT told *Mr. Taylor* they would hear him further in support of the motion. The Court, on hearing, refused to lay a rule, being of opinion that a witness, residing more than one hundred miles from the place of trial, could not be compelled to attend; and refused to issue a subpoena commanding the witness to appear before the mayor of Norfolk to testify. See Acts of Congress, September 24, 1789, § 30, [1 Stat. at Large, 88]; and March 2, 1793, § 6, [1 Stat. at Large, 333.]

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GOVERNOR OF VIRGINIA, use of Loudon County, v. EVANS *et al.*
his Sureties.

In an action for the use of a county, inhabitants of the county are competent witnesses for the plaintiff. The principal obligor is a competent witness for the sureties, upon a collateral issue, where the defendants plead separately in an action upon a bond with a collateral condition. And so one surety is a competent witness for another surety; but the sureties are not competent witnesses for the principal. If a witness be surety for costs, the Court will permit other security to be substituted, so as to remove the interest of the witness.

DEBT on a bond conditioned to perform covenants respecting the building of a bridge at the county charge, in the county of Loudon, in Virginia.

Mr. Taylor and *Mr. Youngs*, for the defendant, objected to an inhabitant of Loudon county as a witness, on account of his interest.

Mr. Swann, contra. The witness is not directly interested, or if he has any interest it is too small, and remote. See *Rex v. Carpenter*, 2 Shower, 47; Gilbert, L. E. 240; *The Weavers of Norwich's case*; Trials *per pais*, 329; *Common Council v. Brockett*, in this court, November term, 1807, [*ante*, 505.]

The COURT, (DUCKETT, J., absent,) CRANCH, C. J., having some doubt, admitted the witness, with leave to move for a new trial, if the verdict should be for the plaintiff.

The COURT admitted also, as a witness, *Mr. Lyons*, an inhabitant of Loudon county, and one of the county commissioners who contracted with Evans for the bridge.

Mr. Taylor and *Mr. Youngs*, for the defendant, objected and took a bill of exceptions.

The three defendants, Evans, Lewis, and Thomas, pleaded severally, and the defendants' counsel offered Evans as a witness for Lewis and Thomas.

Mr. Swann, for the plaintiff, objected that it is a joint suit.

Mr. Taylor. The plea is, that the articles are not the same to

which the bond alludes, and Evans is competent to prove that fact on that issue.

The COURT (DUCKETT, J., absent,) admitted Evans as a witness for Lewis, on the issue as to the identity of the articles of agreement, and referred to the cases of *Harper v. Smith*, July, 1808, in this court, [*ante*, 495,] and *Riddle v. Moss*, in this court; and *United States v. Pawling*, in the Supreme Court of the United States, 4 Cranch, 219.

The jury not being able to agree at July term, 1809, were discharged, and the cause was continued.

This cause having again come to trial,—

Mr. Swann, for the plaintiff, offered Joseph Smith as a witness.

Mr. Youngs, for the defendants, objected, that Mr. Smith owned two or three acres of land in Loudon county. If plaintiff obtains judgment, the amount will go to alleviate the county taxes. Objection overruled.

John Evans, the principal obligor, and John V. Thomas, one of the sureties, were offered as witnesses for Richard Lewis, another of the sureties.

Mr. E. J. Lee, for the plaintiff, objected that they are joint defendants, and although they have pleaded severally, they are interested.

This Court at the last term, allowed Evans to be a witness, upon what was erroneously supposed to be the opinion of the Supreme Court, in the case of *Pawling et al. v. The United States*, 4 Cranch, 219. That court did not give an opinion on that point.

Mr. Youngs, contra. The witness is clearly chargeable, let the suit against Lewis go one way or the other. The verdict, whether against or for Lewis, will not be evidence for or against Evans.

Mr. Swann, in reply. If one defendant can swear for another, there is no chance of justice.

The COURT said, they had in several cases decided that one joint obligor may be a witness for another when they plead separately. As to one swearing for another, perjury may be committed in any case; but the question is, whether there is such an interest as to disqualify the witness. The principal has no interest to exonerate his sureties, because he himself is liable at all events, either to the Governor of Virginia, or to the sureties. But the sureties are not witnesses for Evans, because if they can prove he has performed all the articles of the agreement they discharge themselves.

John V. Thomas, another of the sureties, was examined in behalf of Lewis on the issue joined by the other surety, Lewis, but not on the issue on the part of Evans. The plaintiff's counsel objected, but the objection was overruled.

Ladd v. Dalany.

Mr. Thomas Swann, who was surety for the costs, was offered as a witness on the part of the plaintiff. This was objected to by the defendant.

Mr. E. J. Lee offered to become surety for the costs, which had accrued or may accrue, and moved that Mr. Swann may be discharged, to which the Court assented, and such an order having been made, Mr. Swann was permitted to testify.

Thomas Davis, another of the sureties, was examined in behalf of Lewis and Thomas, but not of Evans.

Verdict for the defendants, Lewis and Thomas, on the issues joined on their part; and for the plaintiff on the issues joined on the part of Evans the principal.

LADD v. DULANY.

The law of the place where the goods are to be delivered, according to the contract of sale, determines the merchantable quality of the goods.

THIS was an action for money paid, laid out, and expended, in the purchase of plank in Boston to be shipped here for the defendant.

The plaintiff offered in evidence a deposition of Haskins, who had shipped the plank to Ladd, to prove that the boards were merchantable.

Mr. Youngs and *Mr. Taylor*, for the defendant, objected that Haskins was interested to prove the plank merchantable, because if he does so the plaintiff will recover from Dulany, and will not bring an action against Haskins to recover back the money paid him for the plank: But if Ladd fails against Dulany, he may resort to Haskins, and this verdict will be evidence against him.

The COURT admitted the deposition; for the chance of a suit being brought by Ladd against Haskins was but a contingency, and this verdict would not be evidence for Ladd in such a suit, because not between the same parties.

1. The defendant prayed the Court to instruct the jury that if no particular quality of plank was ordered by the defendant, he was not bound to receive it unless it was merchantable according to the inspection of Alexandria.

2. And if the order was for plank of a particular quality, the defendant was bound to receive only plank of that quality.

Mr. Swann, for the plaintiff, contended that if the defendant requested the plaintiff to send to Boston for merchantable white pine boards, and these were merchantable according to the inspection in Boston, the defendant was bound to take them. The

defendant employed the plaintiff to make a contract for him in Boston; the law of that place must govern as to the quality. Suppose an order for flour in Alexandria. It must be merchantable according to the Alexandria inspection.

The COURT instructed the jury that if they should be of opinion from the evidence that the plaintiff was prevailed upon by the defendant to procure in Boston for the defendant, and as his agent, the plank in question, and as his agent, to cause it to be transported to Alexandria, and that no particular orders were given as to the quality, and that the plank was of a quality merchantable according to the inspection in Boston, and transported to Alexandria, then the defendant was bound to receive it according to the Boston inspection. But if the plaintiff had contracted to sell and deliver the plank to the defendant in Alexandria, the defendant was not bound to receive it unless it was merchantable according to the Alexandria inspection. And that if any particular quality was contracted for or ordered, the defendant was not bound to receive any other quality.

McKINDER & GUILLIAT v. SAMUEL DUNLAP.

If the drawer and payee of a check upon a bank reside in the town where the bank is, and the drawer be insolvent; the jury cannot, in law, infer from those facts, that the plaintiffs had used due diligence in demanding payment, and giving notice to the defendant.

THE plaintiffs offered in evidence a check drawn by the defendant upon the bank at Norfolk.

Mr. Jones, for the defendant, contended that in order to charge the defendant, the plaintiffs must prove that they demanded payment from the bank; and gave notice to the defendant in reasonable time.

Mr. Taylor, for the plaintiffs, offered to prove that the plaintiffs and defendant lived in Norfolk; that the bank was in Norfolk and solvent; and that the defendant was insolvent; and contended that the jury might infer from these facts that the plaintiffs had used due diligence in demanding payment from the bank and giving notice to the defendant.

But the COURT was of opinion and so instructed the jury that they could not, in law, make that inference.

MORRISON v. CLIFFORD.

Unliquidated damages for breach of warranty of the soundness of a horse, cannot be set off against a note given for the purchase of the horse. But fraud may be given in evidence; for it avoids the contract altogether.

DEBT on a promissory note. Plea, owe nothing.

The defendant offered evidence that the horse, for which the note was given, was not sound.

The COURT said the defendant could not set off unliquidated damages for breach of the warranty, against the note, but the defendant might give evidence of fraud in obtaining the note. Fraud goes to the whole note; simple breach of warranty goes only to part of the consideration.

GEORGETOWN TURNPIKE-ROAD COMPANY v. G. W. P. CUSTIS.

This Court has jurisdiction to quash an inquisition taken under the charter of the Georgetown and Alexandria Turnpike Company. The inquisition need not be under the seals of the jurors. If the jurors are not disinterested the inquisition will be quashed.

THIS was a rule upon Mr. Custis to show cause why an inquisition which had awarded him three thousand dollars on condemnation of a part of his land for the road, should not be quashed and a new warrant issued.

Mr. E. J. Lee, for the defendant, contended that this Court had no jurisdiction in this case. By the charter of the company, (Act of Congress, 3d of March, 1809, ch. 31,) [2 Stat. at Large, 539,] the power to issue the warrant to summon the jury is given to one of the judges only, and the inquisition is to be returned to the clerk of the county, to be by him recorded, and the valuation is to be conclusive upon all persons. The Court has no power to issue the warrant, nor to prevent the clerk from recording the inquisition. It is to be recorded only for safe-keeping.

Mr. C. Lee, contra. This Court has all the powers of a court of record. The clerk is the officer of this Court, and cannot insert any thing in the records of the Court without its order. If the inquisition has been legally taken it is conclusive; but this Court is to decide whether it has been legally taken. The courts in Virginia have, by the common law, power to quash an inquisition of escheat. *Bennett v. Commonwealth*, 2 Wash. 154. And this Court has the same powers as the District Courts of Virginia. If one judge has the power to issue the warrant, *à fortiori*, the Court, consisting of three judges, has it.

Stewart v. Anderson.

The COURT (CRANCH, C. J., doubting,) were of opinion that they had jurisdiction to prevent the recording, and to quash the proceedings if irregular or illegal.

Mr. F. S. Key then objected to the inquisition that it was not under the seals of the jurors.

Mr. E. J. Lee, *contrá*, was stopped by the Court, upon that point. But it appearing in evidence that some of the jurors were interested, and others did not stand indifferent,—

The COURT (*nem. con.*) refused to suffer the inquisition and proceedings to be recorded, and ordered them to be quashed.¹

STEWART v. ANDERSON.

In an action by the indorsee against the maker of a promissory note, the defendant may set off the payee's note to him, which he held before and at the time he had notice of the assignment of his own note to the plaintiff, although not then payable, but becoming payable before his own note.

DEBT for \$330.56, on the defendant's note dated 23d of April, 1807, payable 180 days after date, to W. Hodgson, and by him assigned to the plaintiff.

The defendant pleaded, 1. *Nil debet*. 2. A set-off of a note due to him from Hodgson before notice of the assignment of defendant's note to the plaintiff. 3. A set-off for goods sold and delivered to Hodgson before notice of the assignment.

To these pleas there were general replications and issues. The jury found a special verdict stating that Hodgson assigned the note to the plaintiff, and on the 14th of August, 1807, informed the defendant that the note was passed away, but not to whom. That the defendant at that time held Hodgson's note for \$566.67, dated June 29, 1807, payable in 60 days, which was given for a full and valuable consideration. That on the 14th of August, 1807, when Hodgson informed the defendant of the assignment of his note, the defendant gave Hodgson a note at 60 days for 225 dollars in lieu of a former note for the same sum payable 3d and 6th of January, 1808, which note Hodgson promised to renew twice. When the defendant was informed by Hodgson, of the assignment of the defendant's note, the defendant made no reply.

They further found for the defendant, provided the Court should be of opinion that the verbal notice given by Hodgson to the defendant on the 14th of August, 1807, of the transfer of the note in the declaration mentioned was not sufficient to bar the defendant's

¹ This judgment was reversed by the Supreme Court of the United States, 6 Cranch, 233, upon the ground that this court had no jurisdiction of the case.

right of setting off the said Hodgson's note of \$566.67 against the plaintiff in this action. But if the Court should be of opinion that the said notice was sufficient to entitle the plaintiff to the money in the declaration mentioned as against the defendant, then they found for the plaintiff.

CRANCH, C. J., delivered the opinion of the Court.

In this case the defendant held Hodgson's note as a just discount to his own note, before he had notice of the assignment of his own note. It was at that time a debt due by Hodgson to the defendant. It was *debitum in præsenti solvendum in futuro*; and would become payable before the defendant's note to Hodgson. The silence of the defendant at the time Hodgson mentioned the assignment is no evidence of a waiver of the right of set-off. The defendant was not bound to give notice to the plaintiff; and to give it to Hodgson would have been futile and unnecessary; as Hodgson must have known it before. All that is required by the doctrine of set-off is that they should be mutual, subsisting, liquidated debts at the time of the plea pleaded.

The notice given by Hodgson to the defendant on the 14th of August, 1807, is not sufficient to bar the defendant's right to the set-off.

Judgment must be entered on the verdict for the defendant.

CIRCUIT COURT OF THE UNITED STATES.

DECEMBER TERM, 1809, AT WASHINGTON.

THE Court met on Monday, December 25th, and called the appearance-docket, and adjourned to Tuesday, the 2d of January, 1810. On the 27th, 28th, 29th, and 30th of December, the Court sat in Alexandria.

GORDON v. LINDO.

A resident of Alexandria may be held to special bail in Washington in an action of debt founded upon a judgment in an action of debt in Virginia, in which bail was given; although no previous writ had been issued against the defendant in Alexandria county.

MOTION by *Mr. Law* for the defendant, to appear without bail.

1st. Because the defendant is a resident of Alexandria county, and has never resided in this county; and by the law of Maryland, 1791, c. 43, § 14, cannot be arrested here until a *non est* has been returned in Alexandria county.

2d. Because this is an action of debt upon a judgment in an action of debt in Virginia, in which bail was given. 1 Sellon, 45; *Collins v. Powell*, 2 T. R. 757; *Melan v. Fitz James*, 1 Bos. & Pul. 138. If this action had been brought in Virginia, he could not have been held to bail. Upon a foreign contract on which the defendant could not in that county be held to bail, no bail can be required here.

3d. Because these suits were brought while other suits for the same cause were pending in Alexandria. Sellon, 50.

Mr. Porter, contra. If the first suit be in a different court, bail shall be given. *Davis v. Leckie*, Barnes, 94; *Kendal v. Carey*, 2 W. Bl. 768. The defendant ought to be put to his plea of abatement on the ground of other actions depending in Alexandria.

The COURT stopped *Mr. Porter* on the 1st point ; saying it had been decided in the case of *Thompson v. Lacy*, at March adjourned court, at Washington, 1802, [*ante*, 79,] that a resident of Alexandria, arrested here, must give special bail, although no previous writ had been issued against him in Alexandria county ; and after further argument the Court (*nem. con.*) ruled the defendant to give special bail ; being of opinion,

1. That the Act of Assembly of Maryland did not apply, inasmuch as there was but one county in this district subject to the law of Maryland. The Court had considered the two counties, for several purposes, as two separate States ; slaves imported into Washington from Alexandria had been decided to be imported from another State. Process does not run from one county to the other.

2. That the law of practice of England, not to hold to bail in an action on a judgment does not apply, because this is not the jurisdiction under which the original judgment was rendered. The reason of the decisions in England, was the oppression and vexation of holding to bail, a second time, when the plaintiff might have had execution.

3. That the law of Virginia for not holding to bail, being also founded upon the supposed vexation or oppression of twice holding to bail, can only apply to the same jurisdiction.

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T. S. LEE v. THORNTON & MONROE.

Unliquidated damages arising from the non-performance of a verbal promise to convey real estate made without consideration and under a mistake of fact, cannot, in equity, be set off against a judgment at law.

CRANCH, C. J., delivered the opinion of the Court as follows :—

The facts of this case, as they appear from the bill, answers, exhibits, and other evidence, are, that the commissioners of Washington had obtained judgment at law against the complainant for \$9,333.33. That M. & N. being indebted to the complainant by two promissory notes of \$1500 each, and claiming a right to conveyances in fee to their order from the commissioners, of certain lots in Washington, offered to secure the complainant by an order on the commissioners for a conveyance of those lots ; whereupon the complainant applied to the commissioners to know whether they would convey those lots to him in fee upon such an order. The commissioners replied that M. & N. had paid for more lots than had been conveyed to them, and that they, the commission-

ers, would convey the lots in question to the defendant upon producing the order of M & N. for that purpose.

On the next day the complainant produced the order, and the commissioners promised verbally to have the deeds drawn as soon as their clerks were at leisure. On the next day they discovered that M. & N. had not paid for the lots, and informed the complainant of their mistake, and refused to convey the lots unless the purchase-money should be paid. The complainant had, before receiving this information, delivered up to M. & N. one of the notes, and had promised to deliver up the other; but had taken a new engagement on the part of M. & N. to pay the \$ 3,000, and interest in nine months, in default whereof the complainant was to sell the lots; if they produced more than the debt and interest and costs, he was to pay them the overplus; if less, they were to pay him the balance.

The question, arising upon these facts, is, whether the complainant can, in equity, set off against a judgment at law, unliquidated damages arising from the non-performance of a verbal promise to convey certain lots; which promise was made without consideration and under a mistake of the fact of payment. If the bill had sought a specific performance of such a promise it must have been dismissed upon two grounds;—

1st. Because a verbal agreement to convey land is void by the statute of frauds; and

2d. Because a court of equity will not enforce the specific execution of a contract founded upon a mistake of a material fact. In such a case there would be wanting the very essence of an agreement, the assent of the mind. There would also be a defect of consideration.

If there be any equity in the case, it must arise, not from the non-performance of a promise founded on a mistake, but from the equitable obligation which a party is under to repair damage which he may have caused by his mistake or ignorance of a fact which it was his duty and in his power to have ascertained or known, and which it was not equally the duty and in the power of the injured party to have ascertained or known.

The fact whether the purchase-money had or had not been paid by M. & N. was a fact which the commissioners ought to have ascertained before they made the promise. The ascertainment of that fact was within their power, but not within the power of the complainant. And if, by reason of that promise, the complainant has suffered an injury, the commissioners who rashly or negligently made the promise, ought in equity to repair that injury, although they were ignorant of the true state of the fact, at the time of the promise. The question then is, did the complainant suffer

any and what injury by reason of the promise? The only injury suggested by the bill, as arising from the promise, is that the complainant was induced thereby to give up one of the notes for \$1500, and to promise to give up the other, and to desist from arresting Mr. Nicholson; by doing which while he was at Washington, the complainant might have recovered the whole amount of debt and interest; from which he says, it appears to him to be ascertained, that by reason of the promise and refusal of the commissioners to convey the lots, he has lost the debt.

The promise to give up one of the notes, certainly could not injure the complainant, because that promise, being founded on a mistake, was not obligatory, and the moment he was informed of the mistake he might have commenced an action upon it; and it appears by the answers that Mr. Nicholson remained at Washington a considerable time after the complainant received information of the mistake, and might have been arrested.

Nor did the actual delivery up of the other note injure the complainant, for as the delivery was founded upon a mistake, and upon a consideration which had failed, the debt was not cancelled by the delivery up or destruction of the note which was but evidence of the debt. And although the complainant had lost part of his evidence, yet there was enough left to support the action. The fact of the delivery up of the note; the fact of the mistake; the fact of the failure of the consideration upon which the note was delivered up, were all capable of proof, and would have enabled the plaintiff to support an action at law, immediately, in some form or other, for the amount of the note thus given up. If, therefore, after the discovery of the mistake, the complainant desisted from bringing his action and holding Mr. Nicholson to bail, he desisted at his own peril.

Although the complainant had taken a new engagement from M. & N. to pay the debt in nine months, yet as that agreement was also founded upon mistake, it was no bar to an immediate action by the complainant against them for the amount of the notes. As therefore the promise to deliver up one of the notes and the actual delivery of the other, did not deprive the complainant of an immediate right of action upon discovery of the mistake; as the mistake was discovered within two days after the promise and delivery up of the note; as no material alteration appears to have taken place in the affairs of M. & N. during those two days, and as Mr. Nicholson remained at Washington, and liable to process a considerable time after the complainant had notice of the mistake, the Court cannot see how the complainant has been injured by the promise of the commissioners to

 United States v. Collins.

convey the lots. We are therefore of opinion that the injunction should be dissolved and the bill dismissed with costs.¹

 GARDNER v. LINDO.

Bail.

Mr. Law, for the defendant, moved to appear without bail on the ground that a suit had been before brought upon the same cause of action, appearing upon affidavit, which suit had been decided by the Supreme Court of the United States in his favor, but not on the merits.

The COURT (FITZHUGH, J., absent,) overruled the motion.

 UNITED STATES v. DAVID COLLINS.

The mother of a bastard is a competent witness for the United States on an indictment of the supposed father, under the Maryland Act of 1781, c. 13, and may be cross-examined as to her connection with other persons.

Evidence of a likeness of the child to its supposed father is not admissible.

The confession of the defendant having been given in evidence, he was not permitted to give evidence of his declarations at the same time, that others also had had connection with her.

The only judgment which the Court can give upon a conviction under the statute is, that the defendant give security to indemnify the county from any charge for the maintenance of the child.

The order for paying £ 30 a year can only be made by a justice of the peace, under the act of 1796, c. 34.

INDICTMENT for not supporting a bastard child, under the Act of Maryland of 1781, c. 13.

The mother was received as a competent witness, although she was to be relieved from the charge of maintaining the child, by convicting the defendant.

Mr. Jones, attorney for the United States, objected to the cross-examination as to her connection with others.

The COURT limited the inquiry to a period not more than twelve months nor less than six before the birth of the child. But permitted the examination within that period.

The Court refused to admit the testimony of witnesses to prove the likeness between the defendant and the child.

The confession of Collins being given in evidence against him,

¹ Opinion given January 31, 1810.

Affirmed by the Supreme Court of the United States. 7 Cranch, 366.

Mr. F. S. Key, for the defendant, asked whether Collins did not at the same time say that other persons also had had criminal conversation with her.

The COURT refused to permit the question to be put.

The jury found the defendant guilty.

The COURT ordered the traverser to give security in \$250 to indemnify the county; and for want of such security, committed him to the custody of the marshal. The next day he offered bail, and the counsel for the prosecution had included in the condition of the recognizance a clause that the traverser should pay £30 per annum to the mother so long as she should have the custody of the infant; but the Court ordered it struck out, that being a matter within the exclusive jurisdiction of a justice of the peace, under the Maryland Act of 1796, c. 34.

UNITED STATES v. MCCORMICK.

An indictment against a minister for joining in marriage persons under age, without the consent of their parents or guardians, contrary to the Act of Maryland, 1777, c. 12, § 9, must aver that the defendant was, at the time of solemnizing the marriage, a minister authorized and qualified according to the act to celebrate the rite of matrimony; it must, also, (if it contain an averment that it was done without the consent of the parents,) aver that there was a parent then living, and that there was no guardian who could consent, or that it was without the consent of the guardian as well as without the consent of the parents.

Where a statute inflicts a penalty upon persons of a certain description only, it is necessary, in an indictment upon that statute, to aver all the facts necessary to show that the defendant was a person of that description at the time of committing the act.

The addition "clerk," to the name of the defendant, is not a sufficient averment that he was, at the time of the marriage, a minister duly authorized to solemnize that rite.

When negative words constitute a part of the description of an offence, they must be used in the indictment.

THIS cause was tried at December term, 1802, [*ante*, 106,] when a verdict was found for the United States.

Upon the motion in arrest of judgment the case was argued, at July term, 1805, by *Mr. P. B. Key*, in support of the motion, and by *Mr. Jones*, Attorney of the United States, for the prosecution, before KILTY, C. J., and CRANCH and FITZHUGH, assistant judges.

During the subsequent vacation, while the Court held the case under consideration, KILTY, C. J., having been appointed by the Governor and Council of Maryland, chancellor of that State, resigned his office of Chief Judge of the District of Columbia, and CRANCH and FITZHUGH, judges, being divided in opinion, and the Hon. ALLEN BOWIE DUCKETT, having been appointed a judge of

this Court, the case was again argued at December term, 1808, by *Mr. Jones*, for the United States, and *Mr. Caldwell* and *Mr. Law*, for the defendant. At the next term, June, 1809, while the case was still under advisement, *Mr. DUCKETT* left the court intending to return, but did not, and died in August following.

In December, 1809, the Hon. *BUCKNER THRUSTON* was appointed a judge in the place of *Mr. DUCKETT*, and at the December term of that year, the case was again argued by the same counsel.

For the defendant, the motion in arrest of judgment was urged upon two grounds —

1st. Because the indictment does not aver that the traverser was a minister, or person capable of legally joining persons in marriage at the time of the supposed offence.

2d. Because it does not aver that that marriage was without the consent of the guardian.

1. The only part of the indictment in which the ecclesiastical character of the defendant is designated is the addition to his name, which was required by the statute of additions (1 H. 5, c. 5; 2 Hale, P. C. c. 25, p. 176,) and in which it is said that the jurors, "upon their oath present that Andrew Thomas McCormick, late of the county of Washington, clerk," &c. This is only an averment that he was a clerk at the time of the finding of the indictment, not that he was, at the time of the supposed offence, a minister competent to celebrate the rite of matrimony. Even if it was an averment that the defendant was a clerk at the time of the supposed offence, yet he might not have been such a minister as is contemplated by the statute; for the term *clericus* included inferior ecclesiastical officers as well as those in orders, and those who were not authorized to administer the several sacraments, as well as those who were. 2 Hawk. c. 33, § 4; 4 Bl. Com. 366; and Lord Mansfield, in *Rex v. Wheatly*, 2 Burr. 1127, says, "In a criminal charge there is no latitude of intendment to include any thing more than is charged. The charge must be explicit enough to support itself." The term clerk, as used in this indictment cannot answer both purposes, namely, as an "addition" and as an averment that the defendant was at the time of the supposed offence, such a person as by the statute of Maryland, was liable to the penalty. The statute of 1 H. 5, c. 5, which, in Judge Chase's letter to Judge Tilghman of the 20th of October, 1798, is said to be in force in Maryland, requires that "in all indictments, in the names of the defendants, additions shall be made of their estate, or degree, or mystery," &c. And it is evident that the word *clerk*, was inserted in the indictment merely in compliance with that statute. There is there

fore no averment that the defendant was, at the time of the supposed offence a minister, or other person liable to the penalty.

2. The indictment contains no averment that the marriage was without the consent of the guardian. It is now said that there was no guardian; but that does not appear by the indictment. It might as well be said that there were no parents living at the time, for it is not averred in the indictment; and even if the parents had been then living, it is possible that the young woman might have had a guardian other than either of her parents. 1 Bl. Com. 461, 462; Maryland law, 1786, c. 45, § 8. The indictment must set out an offence; and if the description of the offence contains negative words, or an exception, there must be a correspondent averment, or no offence will be charged; and the negative averment must cover the whole extent of the exception. *Spieres v. Parker*, 1 T. R. 141; *Rex v. Sparling*, 1 Str. 497; *The King v. Wheatman*, Doug. 345; *Rex v. Jarvis*, 1 Burr. 148; *Rex v. Collins et al.* Palmer, 367, 373; *Commonwealth v. Monagle*, 1 Mass. Rep. 517; 2 Hawk. c. 25, § 112, 113; *Rex v. Hill*, 2 Ld. Raym. 1415; Cr. C. Comp. 176–194 and 220–234; Forms of indictment for offences by constables, sheriffs, coroners, &c., for malfeasance in office. 2 Hawk. c. 25, § 60.

Mr. Jones, contra.—1. The cases cited by the defendant's counsel are where the offence is only in the exercise of a particular office, &c. The great nicety in indictments is, in general, required *in favorem vitæ*, where the prisoner, under the English practice, is not entitled to counsel. The reason does not apply to this country, where counsel is allowed, and especially in misdemeanors which do not imply moral turpitude. 2 Hawk. c. 25, § 61. It is true that where a statute is applicable to persons of a particular description only, the indictment must bring them within that description.

Here the defendant is averred to be a clerk, which means a minister; and it is settled that it is a sufficient description of the defendant that he, *existens* such a person as is described in the statute, did the thing which the statute prohibits. The averment that Andrew Thomas McCormick, clerk, did the prohibited act, on a certain day, is equivalent to an averment that he being a clerk on that day did the act; which would be a sufficient averment. It is not necessary in this country that there should be an addition to the name of the defendant in an indictment, because the proceeding to outlawry is not practised here; and the statute of Henry 5, was only to designate the person in an outlawry. If the designation of the defendant as a clerk, was not necessary as an addition under the statute, it must be considered as a direct averment that the defendant was a minister at the time of the

marriage. No precedent can be found in which there is a substantive averment that the defendant was a minister.

2. It was not necessary to aver that "the marriage was without the consent of the guardian." It is questionable whether any averment is necessary that it was without the consent of anybody. Where the exception, or the facts which justify the act, can be given in evidence by the defendant on the general issue, the indictment need not aver the want of that excuse. In a prosecution for being absent from church without reasonable excuse, the indictment need not state that the defendant had no reasonable excuse. When the fact in justification is in the purview or body of the act, and is contained in a negative proposition, it is not necessary to aver such negative proposition.

If the parents are living it is sufficient to aver it to be done without their consent; if no parents living, then without the consent of the guardian. The averment that it was without the consent of the parents implies that the parents were living at the time, and capable of consenting, and therefore that there was no guardian. The Court will not presume that the parents were dead, or *non compotes mentis*.

The cases cited are cases of summary convictions before justices of the peace, in which a greater nicety is required than in indictments.

In reply, it was said by the counsel for the defendant, that in the cases in which the word *existens* has been considered as a positive averment of the existence of the fact at the time of the offence committed, it is expressly referred to that time. All the precedents say that A. B. of &c., clerk or gentleman, &c., on the day of at &c., being a constable, or sheriff, &c., did the act complained of; so that "*existens*" refers to the very time of committing the act; but the "addition" refers only to the time of finding the indictment. All the cases cited were not cases of summary convictions. *Spieres v. Parker*, 1 T. R. 141, was an action of debt for a penalty under a statute.

January 17th, 1810. — CRANCH, C. J., delivered the opinion of the Court, as follows: —

This is an indictment on the Act of Assembly of Maryland, 1777, c. 12, § 9, for joining in marriage one Mary Anne Densley, being under the age of sixteen years, without the consent of her parents. The indictment sets forth that Andrew Thomas McCormick, clerk, &c. without the consent of the said Hugh Densley, the father, and without the consent of Mary Anne Densley, the mother, unlawfully, knowingly, and wilfully, &c.

It has been moved in arrest of judgment, —

1. That it is not alleged in the indictment, that the traverser

was a minister, or person capable of legally joining persons in marriage.

2. That it does not state the marriage to have been without the consent of the guardian.

The Act of Assembly is in these words, — “If any minister shall join in marriage any male under the age of twenty-one years, or any female under the age of sixteen years and not before married, without the consent of the parent or guardian of every such person, personally given or signified under the hand and seal of the said parent or guardian, and attested by two witnesses, he shall forfeit and pay £500 current money.”

It has been correctly contended, on the part of the traverser, where an act is by statute forbidden to be done by persons of a certain description only, an indictment, grounded on such statute, must, by a substantive averment, bring the traverser within that description. No offence can be committed under the ninth section of the act of 1777, c. 12, on which this indictment is founded, but by a minister. And it seems, by the purview of the act, that it must be by such a minister as by the third section of the same act is authorized to celebrate rites of marriage between white persons. It was necessary therefore that the indictment should state by a direct allegation that the traverser was such a minister at the time when the offence is charged to have been committed. This necessity seems to be admitted by the attorney for the United States, who has with much ingenuity, contended that there is such a direct allegation in the indictment. The traverser is called Andrew Thomas McCormick, clerk. It is said that a clerk, in the technical language of the law, means an ordained minister of religion; that there is no statute in force here which makes it necessary in an indictment to give the offender his proper addition, or to name him by his mystery or degree; and as the process of outlawry is unknown in the practice of our courts, the word *clerk* shall not be considered as a mere addition descriptive of the person at the time of finding the indictment, but may stand for a positive affirmation that the traverser was at the time of committing the offence such a minister as is contemplated in the ninth section of the act; that the word “being” is necessarily to be understood, and that the meaning is the same as if it had been written thus, — that A. T. M. being clerk committed the offence; which, according to the books would be a sufficient averment.

But without deciding whether the statute of additions is in force here, or whether process of outlawry will lie upon an indictment, it is evident that the word *clerk* is used by way of addition, or description of the person, and although such an addition may not be absolutely necessary, yet it does not follow that it must there-

fore have another meaning. In its present form it is only an allegation that the traverser was a clerk at the time of the indictment found; and the allegation would be equally true although the traverser were not a clerk at the time when the offence is charged to have been committed. To give it the meaning which is contended for on the part of the prosecution, the word "being" must be added, which would not be justified by any precedent. But if the word *clerk* implies a direct averment that the traverser was a clerk at the time of the offence alleged, yet it is not an averment that he was a minister authorized to celebrate the rites of marriage; for the term clerk includes both the regular and secular clergy, all of whom were not authorized to solemnize marriage. It may also include clerks of courts, &c., and therefore the averment would be too uncertain.

The second objection to the indictment seems to be equally fatal, for I deem the position to be correct, that all the circumstances which are necessary to constitute the offence must be set forth in the indictment; and that an indictment cannot be good which, if true in all its parts, yet leaves a possibility that the traverser may be innocent. It is true that if a statute contains a saving clause, an exception, or a proviso, which did not constitute a part of the description of the offence, it is not necessary that the indictment on that statute should aver the traverser not to be within the benefit of such saving clause, &c., for there the traverser is left to avail himself of the exception by plea or evidence. But if a part of the description of the offence consists of a negative proposition it is as necessary, in an indictment for that offence, to state the negative as the affirmative part of that description.

If the indictment had not alleged the want of consent of either parents or guardian, it would not have described any offence at all. The want of consent is the essence of the misdemeanor. If then an averment of the want of consent of parents is necessary, why not also an averment of the want of that of the guardian? It is said there was no guardian; but that does not appear. As well may the traverser say there were no parents, and therefore there was no offence in marrying without the consent of parents. The indictment does not aver that the parents were living, and if they were, still there might be a guardian. The indictment would have been equally good if it had stated that the marriage was without the consent of the guardian, and had omitted to aver the want of consent of the parents. Yet it cannot be contended that such an indictment would have been sufficient, without an averment that there were no parents living, or none competent to consent, and that there was a guardian who could consent. The

offence therefore is not sufficiently set forth. The indictment does not aver all the facts which constitute the misdemeanor.

The judgment must be arrested.

FITZHUGH J., *contrâ*. This is a motion in arrest of judgment on a verdict finding the traverser guilty under an indictment which charged "that, Andrew Thomas McCormick, clerk, on 23d of February, 1802, did with force and arms, unlawfully, knowingly, and wilfully solemnize matrimony between Henry Lavler, a bachelor, and M. A. Densley, a single woman, daughter of one H. D. without the consent of the said H. D., and without the consent of M. A. D., wife of said H. D., and mother of said M. A. D., personally given or signified under the hand and seal of said H. D. and M. A. D. his wife, and attested by two witnesses, the said M. A. D. daughter of said H. D. being an infant under the age of 16 years, and not before married," &c. Two reasons have been assigned for arresting the judgment.

1. Because the indictment does not aver that the traverser was a minister or person capable of legally joining in marriage, at the time of the offence.

2. Because it does not state that the marriage was without the consent of the guardian.

In support of the first ground, it has been insisted by the counsel for the traverser, that the word *clerk* is not a sufficient allegation that the defendant acted in the character of a minister, and they therefore infer that he may have acted innocently, and that as the Act of the Maryland Assembly subjects no other persons except ministers to the penalty, the Court cannot by any argument, intendment, or implication, condemn for a crime when the jury have not expressly found him guilty.

By the third section of the act of 1777, ch. 12, "The rites of marriage between any white persons, subjects or inhabitants of this State, shall not be celebrated by any persons within this State, unless by ministers of the Church of England, ministers dissenting from that church, or Romish priests, appointed or ordained according to the rites and ceremonies of their respective churches; or in such manner as has been practised in the State by the society of people called Quakers; and if any person shall celebrate marriage, &c., contrary to the meaning of this act, he shall forfeit &c., five hundred pounds current money."

9th Section. "If any minister shall join in marriage any male under the age of 21 years, or any female under the age of 16 years and not before married, without the consent of the parent or guardian of every such person, personally given or signified under the hand and seal of the said parent or guardian and attested by two witnesses, he shall forfeit &c., five hundred pounds current money."

In determining on the weight of the first objection it will be necessary to see what is the legal acceptance of the word *clerk*, particularly as it has been contended that it is not synonymous with clergyman. Clerk, as defined in the law-books, is one who belongs to the holy ministry of the church and is properly a minister or priest. The word *clerk* is supposed to be derived from the Greek word *καλειο* — *voco*; to call, because ecclesiastical persons insisted that they were called into the service and ministry of God and therefore claimed exemption from temporal jurisdiction. Hence a clerk, minister, or servant are synonymous. Or from *κληρος* — *sortitio*, because the clergy were supposed to have been allotted to divine service. It seems to be *nomen generalissimum* under which are comprehended both regular and secular clergy, not only such as live within certain prescribed rules, as abbots, priors, monks, &c., but also bishops, deacons, parsons, and vicars, — and is generally deemed descriptive of all ecclesiastical persons in holy orders. Indeed ecclesiastical persons are said to be well described by the words, *Legum Doctor* and *sacris ordinibus constitutus*. 1 Hawk. P. C. ch. 19, § 3. The statute of 1 Eliz. c. 2, subjects “any parson, vicar, or other minister whatsoever, who ought to say the common prayer and shall refuse to use it in church, to one year’s profits of all his spiritual promotions and one month’s imprisonment for the first offence,” &c., and yet in an indictment for an offence against this statute, it has been held that the word *clericus* shows sufficiently that the party was within holy orders, although the word *clerk* is not used in the statute. 1 Hawk. P. C. ch. 7. The word *clerk* then being equivalent to, and descriptive of, clergyman in England where there are various grades of clergy with various privileges and emoluments, some sinecures, others with cures. I conclude *a fortiori*, that the word *clerk* describes a clergyman with sufficient certainty here, where no such variety exists, and where no ambiguity can arise as to the character in which the defendant acted.

But it has been argued that where a statute creates an offence, the words of description should be precisely pursued in an indictment under the statute. The quotation just mentioned, respecting the exposition of the statute of Eliz. is alone an answer to, and obviates this objection; for there the word *clerk* was not used and yet it might have been insisted there, as it has been here, that the word *clerk* might refer to and describe a clerk of court, and so by possibility the defendant be innocent notwithstanding the indictment be literally true; or it might, with a fairer prospect of success, have been urged that, though clerk meant clergyman, yet it might be understood as applicable to

the regular clergy instead of the secular clergy and therefore not contemplated by that statute. If the offender be brought within the purview of a statute, it is sufficient; and if by a rational construction of the whole indictment a person is described with such certainty that it is impossible to mistake him for another, or the character in which he acted; or that he may know how to defend himself against the charge; or that he may plead in bar of another prosecution; or if it can judicially appear to the Court what punishment is proper, such an indictment ought to be sustained. In the case now before us, the traverser has been convicted of having in character of clerk, solemnized marriage. If the word *clerk* receives one acceptation the offence is indisputably made out: if tortured to mean a clerk of a court or any thing else except minister, then he cannot be guilty of solemnizing marriage, though that fact is expressly found by the jury. In one sense of the word, the defendant may have consummated the marriage: in the other he could not. In this view of the case no rule of construction justifies the Court to lay hold of a solitary expression for the purpose of acquitting the traverser; when a liberal view of the whole indictment taken together with the verdict could leave no doubt on the mind as to the character in which he acted. Though judgments in favor of life and in avoidance of penalties are generally construed strictly, yet they are expounded like other writings by taking them altogether and introducing one part in explanation of another, (4 Com. Dig. 397, G. 5,) so that a general or ambiguous expression may be rendered certain; and certainty to a common intent is sufficient in an indictment. Co. Litt. 303, a; 5. Co. 121, a.

There seems more difficulty in the second objection, that the indictment does not set out the want of the guardian's consent; but still I am inclined to think that this omission is not fatal. It is a rule that when there is a negative in the description of an offence in a statute, the affirmative of which would excuse the traverser, it need not be set forth in the indictment, but must be pleaded by the defendant or shown as his excuse or justification. 5 T. R. 84; 1 Hawk. P. C. ch. 10; 2 Hawk. ch. 25; § 115; 2 Ld. Raym. 1370; 2 Burr. 1035. And I can find nothing which looks like an exception to this rule but cases of indictments in England for offences under the game laws, where the qualifications must be all negated in the indictment. This may be accounted for on the ground of there being an immense number of statutes restrictive of the privilege of killing game, commencing as early as 13 Rich. 2, with such a variety of penalties and qualifications, that it might be uncertain what judg-

ment the court could render or by what evidence the traverser could protect himself, unless the supposed offence should be reduced to the most definite and unquestionable form. Another reason why the game laws form an exception to the general rule may be, that the offences under them are punishable by justices of the peace, whose limited jurisdiction, the supreme courts have been unwilling to enlarge or favor. But in the case of the *Queen v. Matthews*, 14 Vin. 3, S. C. (10 Mod. 27,) on an exception taken to a conviction on 4 and 5 Anne, for the preservation of game, it was held that if it had been laid generally, "that he not being a person qualified according to the law," it would have been well enough; but the qualifications having been distinctly and severally mentioned, the omission of one is fatal. It might perhaps have been sufficient if the indictment in the present case had barely stated the solemnization of the marriage of an infant, omitting consent altogether, because the mischief intended to be avoided by the law, was the improper influence which might be used on persons wanting discretion and judgment to direct them in so important a step as marriage, and any thing which would justify or excuse such intermeddling might come out in evidence or be pleaded. The prosecutor cannot prove the negative, that consent was not given in writing, but the traverser could have done so; and the law evidently meant to impose on him this necessity by requiring a license in writing properly authenticated, thereby furnishing defendant with the means of justifying himself; this being in writing might and ought to have been preserved if it ever existed. When the parent delivers this writing to the minister, it is no longer within his control or of any other person except the minister, and therefore it would be requiring an impossibility to insist on its being produced on the part of the prosecution, and it is a rule that that which need not be proved need not be averred.

The statute of additions is said to be in force in Maryland. Be it so. 1 Hawk. c. 7, shows that clerk is definite enough; clerk is a good addition for a doctor of divinity. 2 Hawk. c. 23, § 109. The addition should refer plainly to the person indicted, so that one may not be substituted for another. But it has been objected, that the person who drew this indictment was sensible that the indictment should have been special in its averment of the requisites of the law, and having inserted some, the omission of others is fatal. This offence is in my opinion completely stated by making out either alternative requisite, and the guardian's consent is as distinct from the parent's as if it had been in another section—as much so as the written license of the clerk, which is also made a protective requisite; and it

has not been contended that the indictment should have negatived that. But with respect to the insertion of one requisite and the omission of others; where an indictment is brought on a statute which has general prohibitory words, it is sufficient to charge the offence generally in the words of it; and if a subsequent statute or clause in the same statute, excuse or except persons particularly circumstanced out of the general words, it must be pleaded, or given in evidence: as an indictment on 5 Eliz. c. 4, for exercising the trade of a tanner, not having served an apprenticeship of seven years, is sufficient without averring the want of other qualifications, &c.

But when the words of a statute are descriptive of the nature of the offence or the purview of the statute, or are necessary to give a summary jurisdiction, the indictment must specify it in particular words, as game acts; swearing; counterfeiting coin; &c. 4 Com. Dig. 397, G. 5. An indictment need not ascertain more than shows the offence, not that which aggravates it. 4 Com. Dig. 398, G. 5. Nor more certainty than the words of the statute import. But it should use terms proper or peculiar to the offence. If an offence appears in the indictment for which it may be maintained it is sufficient, though bad in other parts. Com. Dig. 408, Judgment, N.; 1 Salk. 384, 385. This offence is completely stated by either disjunctive.

In Tremaine's P. C., a person was indicted under the statute of Eliz., to impose a pecuniary fine on a resident within the king's realm for not going to church, not having a reasonable excuse. The indictment averred, that the defendant had no reasonable excuse, but omitted his being a resident of the king's realm. This shows that the insertion of one of the requisites does not render it necessary to enumerate them all. 4 Hawk. c. 10, says it is unnecessary to negative the excuse. The obvious meaning and purview of the law is that the consent of the parents is to be had if there be any capable, &c.; if not, then of the guardian, if there be one legally appointed. The traverser's counsel have resisted the claim of the United States on another ground: that it is uncertain from the indictment when he was clerk, — whether at the time of the supposed offence committed, or at the date of the indictment.

In 2 Hawk. P. C. ch. 25, § 61, 114, it is said to be a sufficient description of a defendant to say that he, *existens* so and so, as brings him within the purview of the statute, did the act without alleging that he was so at the time of the fact; that shall be intended: but where *existens* applies to the fact, it is otherwise; as if an indictment states that A disseized B of land being the freehold of the said B, it is fatal, because it is indif-

Ball v. Patterson.

ferent whether it was B's freehold at the time of the disseisin, or the finding the indictment—and in section 61, it is said to be the natural construction of the participle *existens* going before the verb to which it is the nominative; but in the case of the disseisin, it is doubtful whether it is nominative to the verb, or applied to the thing which is the subject of the action; so that the difference as to its construction appears to be between its application to the person and the fact, and *Johnson's case*, Cro. Jac. 610, is pointed in support of this distinction. So, 4 Com. Dig. 397; 2 Roll. 226.

From the view I have taken of the points submitted to the Court, it would appear to be over nice and critical if this judgment should be arrested, and in the language of a learned law writer, "as on the one hand the court will not by any argument or inference condemn for a crime whereof the jury have not found the party guilty; so on the other hand it will not suffer him to escape on a trivial exception: but the judgment must be in great measure left to the discretion of the court, who from the circumstances of each particular case, the comparison of precedents, and the plain reason of the thing, seem to have gone within those rules as near as possible." In a case circumstanced like the one before us, where the indictment brings the offence within the purview of the statute; where the traverser with a knowledge of the infancy of the daughter, solemnizes a marriage without the consent of her parents, and without pleading or showing any justification or excuse, I think the judgment should not be arrested.

BALL v. PATTERSON.

In trover for "a chest containing sundry tools," and a "trunk containing sundry clothes," the plaintiff cannot give evidence of the value of the tools and clothes; the defendant being charged only with the conversion of the chest and trunk containing the tools and clothes, and not of the tools and clothes themselves.

TROVER for "a chest containing sundry tools" and "a trunk containing sundry clothes."

Mr. F. S. Key, for the defendant, objected to the evidence of the value of the tools, the conversion of the chest and trunk only, being averred. The conversion is the gist of the action.

Mr. Law, contra. The trover is of a "chest containing sundry tools," and "a trunk containing sundry clothes." The conversion is of the said chest, and the said trunk; that is, the chest containing the tools, and the trunk containing the clothes.

Mr. Caldwell, for the defendant. If it is a charge for converting the tools and clothes, it is too vague and uncertain.

The COURT (THRUSTON, J., doubting,) was of opinion that the defendant was charged only with converting the trunk and the chest, and not the tools and clothes, and of course evidence of the value of the tools and clothes was immaterial.

THE UNITED STATES v. GEORGE MAXWELL.

On an indictment for bigamy, a person who has an action pending against the prisoner for goods furnished to the supposed first wife, is an incompetent witness (by reason of his interest) to prove the first marriage.

Quære,— Whether, after a *nolle prosequi*, entered without the defendant's consent, and after the jury is sworn, he can be held to answer again for the same offence?

INDICTMENT for bigamy.

The right of peremptory challenge was allowed to the defendant without being questioned by the Attorney for the United States.

Mr. F. S. Key and *Mr. Morsell*, for the defendant, objected to a witness because interested; the witness having a suit against the defendant for necessaries furnished to the first wife. The verdict in this cause is *primâ facie* evidence of the marriage in that suit. So in an indictment for forgery, the party whose name is forged is not a competent witness. So in perjury, a conviction is conclusive evidence in another suit. Bul. N. P. 245; *Boyle v. Boyle*, 3 Mod. 164; S. P. McNally, 142. In *Dr. Dodd's case*, *Ld. Chesterfield* was rejected until he had a release from the obligee named in the forged bond. Peake, 100; *Rex v. Whiting*, 1 Salk. 283.

Mr. Jones, contra. The authorities cited only go to the cases of forgery or perjury. Here the witness says on the *voir dire* that he does not consider himself as interested. McNally, 140.

If evidence at all, it is conclusive, if not conclusive it is no evidence. A conviction for assault and battery cannot be given in evidence in the civil suit. The cases in Buller are between the same parties. *Abrahams qui tam v. Bunn*, Peake, 95; McNally, 107, 144.

The COURT, (CRANCH, C. J., doubting,) decided that the witness was incompetent, by reason of the interest, being inclined to think that the verdict might be given in evidence for the witness in his suit for the support of the first wife.

Mr. Jones, for the United States, offered a *nolle prosequi* to be entered, and the jury was discharged.

Mr. Jones, then moved the Court to bind the prisoner over to answer to such an indictment at the next term.

Riggs v. St. Clair.

The COURT said they should take time to consider till tomorrow.

Mr. Key objected that the court could not recommit the prisoner, as there was no charge upon the oath of a competent witness.

The question does not appear to have been moved again.

RIGGS v. ST. CLAIR.

A request by the indorser of a note to the holder, to push the maker, is not evidence of waiver of demand and notice; but is evidence from which the jury may infer due demand and notice.

The insertion of the words "value received," after an indorsement, does not avoid the note unless done with the privity of the plaintiff.

ASSUMPSIT upon F. L. Hamilton's note indorsed by the defendant, 28th of May, 1808, at sixty days; protested 2d of August.

Mr. Caldwell, for the defendant. The demand ought to have been on the 30th or 31st of July.

Mr. F. S. Key, contended that the subsequent conversation, in which the defendant requested the plaintiff to pursue Hamilton and expressed uneasiness, is evidence of a due demand and notice, or of waiver of notice.

Mr. Caldwell. If the conversation was under ignorance of the fact that due notice was not given, it is immaterial. Chitty, 102.

Mr. Caldwell, for the defendant, prayed the Court to instruct the jury that the letter and conversation were not evidence of a waiver of demand on the drawer, or of due notice to the defendant.

The COURT gave the instruction, (FITZHUGH, J., *contra*.)

Mr. F. S. Key, then prayed the Court to instruct the jury that the conversation was evidence from which the jury might infer due demand and notice, and the Court gave the instruction.

Mr. Caldwell, for the defendant, contended that the words *value received* were inserted since it was indorsed, and therefore avoided the note. *Master v. Miller*, 4 T. R. 320.

The COURT was of opinion that the alteration was immaterial, and did not avoid the note unless it was made with the privity of the plaintiff.

Mr. Caldwell then prayed the Court to instruct the jury that if they should be satisfied by the evidence that the note was indorsed by the defendant to give a credit to the note and to be discounted at the bank; that it was not discounted, but passed away by Hamilton to Riggs, who took it in lieu of another smaller note of Hamilton's and paid the difference in cash, the

Ball v. Patterson.

plaintiff cannot recover against the defendant more than the amount of the money so paid.

But the COURT refused, upon the principle of negotiability of the note. The plaintiff is only bound to show that he came fairly by it, as in the case of a note payable to bearer, and lost or stolen, &c.

THE UNITED STATES v. JOHN TOMS.

Peremptory challenge refused in a case of horse stealing. Continuance, prayed on account of the absence of a witness who could testify that he heard another man confess that he had stolen the horse, refused.

INDICTMENT for stealing John Cannon's horse.

Upon the authority of the *United States v. McPherson*, in this Court at December term, 1807, the prisoner was refused the right of challenge, the offence having been decided to be simple larceny under the Act of Congress.

The COURT refused a continuance on the ground of the absence of a witness who would swear that he heard another man confess that he stole such a horse from John Cannon, the Court being of opinion that it was not competent evidence.

BALL v. PATTERSON.

A declaration in trover for "a tool-chest containing divers tools, and working utensils," and a "trunk containing clothes," is sufficiently certain.

THE declaration having been amended, and a verdict rendered for the plaintiff, the defendant moved in arrest of judgment for uncertainty of the declaration, which was for "a tool-chest containing divers tools and working utensils," and "a trunk containing clothes."

Mr. Caldwell, for the defendant. A chest of tools would have been good; but a chest containing divers tools and working utensils, is not. It is too vague. *Bottomly v. Harrison*, 2 Str. 809.

The COURT was of opinion that the declaration was good as to the trunk and chest, and tools and clothes.

Judgment for the plaintiff.

 Wilson v. The Marshal of the District of Columbia.

LENOX v. THE CORPORATION OF GEORGETOWN.

The corporation of Georgetown could not impose a penalty on hack-owners residing out of Georgetown, for bringing passengers into Georgetown from the city of Washington, if they take only the city price for driving to the verge of the city.

APPEAL from a conviction before a justice of the peace of Georgetown on the by-law of Georgetown, being a supplement to the act for licensing hacks, for conveying a passenger into Georgetown in a city hack without taking out a license from the corporation of Georgetown.

Mr. Jones, for Lenox. The streets of Georgetown are common highways. If the hack-owner be not a resident of Georgetown, and if he charges nothing for carrying the passenger into Georgetown; if he only charges for carrying him to the western limits of the city; he does not violate the by-law.

Mr. F. S. Key, *contrà*. The contract was to take the passenger from the Capitol to the Union Tavern, in Georgetown. It is true he took no more than the price limited by the by-law of the city of Washington, for carrying him to the western limits of the city; but it was part of the contract to carry him to the Union Tavern.

There is no fixed price in the city; the by-law of the city is only that the price shall not exceed certain rates.

The COURT was of opinion that the corporation of Georgetown could not lawfully pass such an ordinance, imposing a penalty on hack-owners residing out of the town of Georgetown for bringing into Georgetown from elsewhere passengers, under the circumstances in the case stated, namely, taking only the city price for driving to the verge of the city.

Judgment reversed.

 WILSON v. THE MARSHAL OF THE DISTRICT OF COLUMBIA.

When a debtor is in the prison bounds, the Court will not award a *habeas corpus* to discharge him on the ground that his creditor has refused to pay his daily allowance.

MOTION for *habeas corpus* to bring up W. Wilson, a debtor confined in the prison bounds of Alexandria, upon a *capias satisfaciendum* in a civil cause, to be discharged. The marshal having demanded of the creditor the daily allowance according to the Act of Congress 3d of March, 1803, [2 Stat. at Large, 237,] which the creditor refused to pay. Notice of this motion had been served on Colonel Simms, the agent of the creditor.

Mr. E. J. Lee, for Wilson. There is no difference between

imprisonment within the walls of the prison-house and the walls of the prison-yard. The statute says that the party keeping within the bounds shall be "adjudged in law a true prisoner."

The COURT refused to issue the *habeas corpus*, saying that they would not in this *ex parte* summary mode undertake to decide the question of law. Mr. Wilson, if he chose to run the risk of involving his sureties, might depart; or if the marshal was satisfied, he might discharge him; or if the marshal refused, he might bring his action of false imprisonment.

Mr. Lee afterwards applied to the Supreme Court of the United States, who refused to award a *habeas corpus*, not being satisfied that a *habeas corpus* is the proper remedy in a case of arrest under civil process. 6 Cranch, 52.

CARROLL V. H. WHITCROFT, Treasurer of the city of Washington.

The Act of Maryland, 1785, c. 34, which forbids the replevin of goods distrained for public dues, is not applicable to the corporation taxes of the city of Washington.

REPLEVIN of personal property distrained for taxes due to the city of Washington.

Mr. Caldwell and Mr. Key, for the defendant, objected that by the Act of Maryland, 1785, c. 34, and 1790, c. 53, goods distrained for taxes cannot be replevied, and moved to quash the writ of replevin. The question is whether the law of Maryland is applicable to taxes imposed by the corporation of Washington on its inhabitants. They are within the same reason.

In the case of *Taylor v. Varden*, at the last term of the Court, the law of Maryland respecting sales for taxes was considered by both sides as in force.

Mr. Law, and Mr. Jones, *contrà*. The Act of Maryland of 1785, applies only to the State taxes of Maryland, and applies only to collectors of such taxes. It does not apply to county taxes; *à fortiori* not to corporation taxes. It applies only to collectors of arrearages of State taxes. So also the act of 1790. By the act of 1786, c. 12, the commissioners are to hear complaints of abuse of the power of distress. The Act of Maryland did not apply to the corporation taxes of Baltimore or Annapolis.

Mr. F. S. Key, in reply. The law does not apply to the city of Annapolis. There never was a State tax in Maryland. The only taxes are county taxes, laid, and the collectors appointed by the Levy Court. The law applies to county collectors, and with the same reason to the city of Annapolis.

The COURT (*nem. con.*) was of opinion that the Act of Maryland did not apply to taxes laid by the corporation of Washington; and refused to quash the replevin.

CIRCUIT COURT OF THE UNITED STATES.

APRIL, 1810, ADJOURNED COURT, AT WASHINGTON.

HANDY v. JOEL BROWN.

An infant cannot bind himself as an apprentice; nor can a master assign the indenture of his apprentice.

HABEAS CORPUS and petition to discharge an apprentice.

Brown, the master, being about to leave Georgetown, assigned the apprentice, with his shop, to another person. The articles of apprenticeship were merely a contract between the boy (who was sixteen years old) and the master.

Mr. Jones, for the petitioner. There are only three modes of binding under the Act of Maryland, namely, by the Orphans' Court, by two justices of the peace, or by the father. These indentures are not binding on the infant; and whether binding or not, the master could not assign them.

Mr. F. S. Key, contra. This is not a contract for personal instruction. The indentures say, "teach or cause to be taught." All contracts for necessities are binding on an infant. This is a contract for food, clothing, and instruction; all of which are necessities.

The COURT (FITZHUGH, J., absent,) discharged the petitioner; it not being a binding within the Act of Assembly of Maryland, 1793, c. 45. If the indenture is binding as an agreement, still it does not create the relative obligations of master and apprentice, under the act; and if it did, the 14th section forbids the assignment except in the case of the death of the master.

INDEX.

ABATEMENT.

1. If one of two joint partners, or contractors, is sued alone upon a joint contract, he must plead it in abatement; he cannot take advantage of it upon the general issue. *Clementson v. Beatty*, 178.
2. The writ is not abated by substituting the assignee as plaintiff in place of the bankrupt. *Wise v. Decker*, 190.
3. After a general appearance the defendant may plead in abatement that the *capias* was not properly served. *Knox v. Summers*, 260.
4. To support a plea in abatement for not naming all the joint promisors, it is not necessary for the defendant to prove that the plaintiff knew that he was dealing with a copartnership. *Norwood v. Sutton*, 327.

ACCESSORY.

There cannot be an accessory, at common law, to an offence which does not amount to felony. *United States v. Williams*, 174.

ACCIDENT.

A casualty happening against the will, and without the negligence or other default of the party is, as to him, an inevitable casualty. *Hodgson v. Dexter*, 109.

ACKNOWLEDGMENT.

The execution of a deed need not be proved by the witnesses if it be acknowledged and recorded. *Edmondson v. Lovell*, 103.

ACCOUNT.

1. The account annexed to the declaration, "for sundry matters properly chargeable in account as by account annexed," need not be such as is *per se* evidence under the Maryland Act of 1729, c. 20. *McLaughlin v. Turner*, 476.
2. A set-off, or account in bar, must be filed one term before trial, in Alexandria. *Janney v. Bdggett*, 503.
3. On a count "for sundry matters properly chargeable in account," the plaintiff may give evidence of money lent, although no account was filed, or annexed to the declaration. *Lovejoy v. Wilson*, 102.

ACTION UPON THE CASE.

1. A person who has the right to do an act, has a right to use the necessary means. *Hoe v. Mayor & Com. Alexandria*, 98.
2. The principal is liable for the conduct of his agent while acting in his employment, although he act without, or contrary to, his order. *Ibid.*
3. Full costs are allowed upon a verdict for one cent damages, in an action upon the case for damages occasioned by raising the level of the street. *Ibid.*
4. In an action, on the case against a deputy-postmaster, for negligence, the instructions of the postmaster-general may be given in evidence. *Dunlop v. Munroe*, 536.
5. A deputy-postmaster and his clerks, are only bound to use such care and diligence in the discharge of their duties, as a prudent man exercises in his own affairs. *Ibid.*
6. Deputy-postmasters are civilly liable for the acts of their servants and clerks; but the neglect of the servant or clerk cannot be given in evidence upon a count charging the loss to have been incurred by the neglect of the deputy-postmaster himself. *Ibid.*

ADDITION.

The addition "clerk" to the name of the defendant is not a sufficient averment that he was at the time of the marriage, a minister duly authorized to celebrate that rite. *United States v. McCormick*, 593.

ADJOURNMENT.

An adjourned term is an extension of the preceding session, and has no jurisdiction over office judgments rendered between the original and the adjourned term. *Memorandum*, 159.

ADMINISTRATION.

1. The declaration need not state by whom the letters testamentary were granted. *Cawood v. Nichols*, 180.
2. Although the plaintiffs name themselves administrators, yet, if they have not made *proof* of their letters of administration, they are not bound to give oyer of them. *Mason's Adm. v. Lawrason*, 190.
3. Administrators are bound to plead before the expiration of the year. *Buckley v. Beatty's Adm.* 245.
4. An administrator in Alexandria county, has a right at law to give a preference to a creditor by confessing a judgment; and a court of equity will not interfere by injunction. *Wilson v. Wilson*, 255.
5. The administrator of appearance-bail cannot be allowed to appear as appearance bail and plead for the principal. *Finley v. McCarthy*, 266.
6. A defendant who obtained letters of administration in Fairfax county in Virginia before the District of Columbia was separated from it, cannot in a suit in the district, after its separation, sustain the plea of "never administrator." *Courtney v. Hunter's Adm.* 265.
7. A promise by an administrator in consideration of assets, is a promise as administrator, and the judgment is *de bonis testatoris*. *Ibid.* *Fuxon v. Dyson's Adm.* 441.
8. If the sureties of an administratrix reside out of the district, a *ne exeat* will be granted to restrain her from moving away with the goods of the deceased before final settlement of her administration accounts. *Patterson v. McLaughlin et al.* 352.
9. An action will not lie against the sureties in an administration bond until the plaintiff shall have proved his debt, and a *devastavit*, in an action against the administrator. *Gilpin v. Osley*, 568.

AGENT.

1. The principal is liable for the conduct of his agent while acting in his employment, although he act without or contrary to his order. *Hoe v. Mayor & Com. Alexandria*, 98.
2. Selling spirituous liquors by the servant, is selling by the master. *United States v. Voss*, 101.
3. The principal is liable to the penalty of the statute of Maryland who suffers his agent to keep a gaming-table contrary to law. *United States v. Conner*, 102.
4. A public agent, contracting for public use, is not personally liable although he contract under his seal. *Hodgson v. Dexter*, 109.
5. An agent of the plaintiff has a right to enter the house of the defendant, with an officer, to show him the goods to be taken on a *fieri facias*; and the authority of the agent need not be in writing, but may be proved by the testimony of the agent himself. *United States v. Baker*, 268.
6. In an action by the indorsee against the maker of a promissory note, the plaintiff need not produce written evidence of the authority of the indorser's agent to indorse. *Miller v. Moore*, 471.

AGREEMENT.

1. Although there be an agreement that the value of extra work should be ascertained by persons mutually chosen, yet, if such valuation has not been actually made, the plaintiff in an action upon a *quantum meruit*, may give other evidence of the value of the work. *Baker v. Herty*, 249.
2. The court will not enforce the private agreements of counsel; but will not suffer parties to be entrapped by such agreements. *Moore v. Dulany*, 341.
3. The court will not receive parol evidence of the agreement of counsel respecting the admission of papers in evidence. *Lambert v. Smith*, 361.

AGREEMENT, (*Continued.*)

4. An agreement by the plaintiff to release the defendant upon his executing a deed, is a good defence on *non assumpsit*; the deed having been executed. *Bartleman v. Douglass*, 450.

ALEXANDRIA.

1. The Alexandria by-laws of 1784 apply to the subsequent addition made to the town by the act of 1797. *Commonwealth v. Smith*, 47.
2. A declaration against "the common council of Alexandria" for work and labor done for "the mayor and commonalty," must show how the new corporation is liable for the debts of the old. *Lyles v. Common Council of Alexandria*, 473.

ALIENS.

1. If one of four parceners be an alien the land descends to the other three. *Contee v. Godfrey*, 479.
2. A British subject could not, in 1793, inherit lands in the United States from a citizen of the United States. *Ibid.*
3. The statute of 7 Anne, c. 5, § 3 does not apply to children born under the same allegiance with that of their father. *Ibid.*
4. A decree of partition between heirs, some of whom are aliens, does not estop those who are not aliens from claiming the whole in ejectment. *Ibid.*

AMENDMENT.

1. An information may be amended by stating that the penalty accrued to the town, instead of the commonwealth. *Commonwealth v. Smith*, 22. *United States v. Evans*, 55. *United States v. Shuck*, 56.
2. In slander, the plaintiff may have leave to withdraw his general replication and file a general demurrer, and the court will permit the defendant to change his plea. *M'Gill v. Sheehee*, 49.
3. The defendant may have leave to amend, on payment of the costs of the term, or a continuance, at the plaintiff's option. *Milburne v. Kearnes*, 77.
4. Leave may be given to substitute a general demurrer for the general issue. *Krouse v. Sprogell*, 78.
5. The court will not give leave to amend by changing the action from case to covenant. *Scholfield v. Fitzhugh*, 108.
6. The court will give the defendant leave to withdraw the plea of "covenants performed," and to file a special plea, if it appear to be a plea to the merits, and not decidedly bad, leaving the plaintiff to his demurrer. *Gill v. Patten*, 114.
7. After a writ of error has been served and returned to the supreme court, the record is no longer before the court below, and cannot be amended, although, at an adjourned session of the same term, it appear that the writ of error has been dismissed in the court above at the request of the party praying the amendment. *United States v. Hooe*, 116.
8. If the clerk neglect to strike out a judgment as ordered by the court, it may be done by order of the court at the next term, on affidavit of the facts. *United States v. Smith*, 127.
9. A declaration may be amended, by leave of the court, by inserting the names of the members of the firm. *Tibbs & Co. v. Parrott*, 177.
10. The court will not give leave to amend a demurrer unless it goes to the merits. *Offutt v. Beatty*, 213.
11. A declaration in slander may be amended by adding a new charge. *Dougherty and wife v. Bentley*, 219.
12. The writ and declaration may be amended by correcting the corporate name of the plaintiff. *Corporation of Georgetown v. Beatty*, 234.
13. The court will not permit an amendment making new parties. *Morris v. Barney*, 245.
14. After plea of "property in the defendant," the court will permit the defendant to plead "property in a stranger," on payment of all antecedent costs, and a continuance if requested. *Semmes v. Oneale*, 246.
15. If, by an amendment, the nature of the action be changed, it is to be considered as a new cause, and may be continued although at the fifth term after its commencement. *Schnertzell v. Purcell*, 246.
16. Substantial amendments must be upon payment of full costs. *Ferris et al. v. Williams*, 281.

AMENDMENT, (*Continued.*)

17. A writ of attachment and *capias* may be amended before condemnation, by leave of the court. *Birch v. Butler*, 319.
18. A material amendment of a bill in equity, after answer, must be on payment of all costs, including the solicitor's fee. *Wallace v. Taylor et al.* 393.
19. When leave is given to amend on payment of costs, the payment is not a condition precedent unless so specially expressed in the order. *Wigfield v. Dyer*, 403. *Butts v. Chapman*, 570.
20. When the record is made up and entered in the record book, it cannot be altered, unless by order of the court under certain circumstances. *Barnes v. Lee*, 430.
21. The plea of "*nul tiel record*" refers to the time of the plea pleaded, and a subsequent amendment of the record does not affect the issue. *Ibid.*
22. A clerical mistake in entering a judgment may be corrected at a subsequent term; and an execution issued thereon may be quashed. *Pierce v. Turner*, 433. *Barnes v. Lee*, 471.
23. After plea of *misnomer* in abatement, the court will not suffer the record to be amended, but upon payment of costs, and a discharge of the bail. *Payen v. Hodgson*, 508.

ANSWER.

An answer in chancery is not sufficiently authenticated, unless the authority of the justice of the peace, before whom it was sworn, be sufficiently shown. *Addison v. Duckett & wife*, 349.

APPEAL.

Costs on appeal from a justice of the peace are within the discretion of the court if the judgment be affirmed in part. *Mead v. Scott*, 401.

APPRENTICE.

1. Assumpsit lies by the apprentice against his master, for not teaching him his trade, although no indentures were executed, the master having taken him under an order of the court. *Adams v. Miller*, 5.
2. The father of an apprentice, who binds himself, is liable upon the indentures by reason of his signature and seal, although there are no express words of covenant binding him. *Woodrow v. Coleman*, 171.
3. A master cannot bring his apprentice from Maryland into Alexandria, and hold him there. *United States v. Scholfield*, 255.
4. The master of an apprentice is concluded, by the recital in the indentures, as to the age of the boy. *McCutchen v. Jamieson*, 348.
5. The Circuit Court in Alexandria, has jurisdiction to discharge an apprentice for the cruelty of the master, and to bind him to a new master. *Cannon v. Davis*, 457.
6. The order of the Orphans' Court to bind out an apprentice, does not constitute the relation of master and apprentice. *Stewart v. Duffey*, 551.
7. An infant cannot bind himself as an apprentice; nor can the master assign the indentures. *Handy v. Brown*, 600.

ARBITRATION.

1. An award is void which is final and conclusive, and does not embrace all the matter submitted and settle the dispute. *Talbott v. Hartley*, 31.
2. When the terms of submission to arbitration are uncertain, parol evidence may be given of the controversies submitted. *Davy v. Faw*, 89.
3. An award may be good in part and void in part. *Wise v. Geiger*, 92.
4. Although there be an agreement that the value of extra work should be ascertained by persons mutually chosen, yet, if such valuation has not been actually made, the plaintiff in an action upon a *quantum meruit*, may give other evidence of the value of the work. *Baker v. Herty*, 249.
5. Parol evidence may be given to explain the terms of submission to arbitrators. *Faw v. Davy*, 440.
6. An award made upon part only of the subjects submitted, will be set aside. *Ibid.*

ARREST.

1. A discharge of the appearance-bail arrested upon a joint *ca. sa.* against him and his principal, does not release the principal. *Watson v. Summers*, 200.

ARREST, (Continued.)

2. When a person is arrested upon a bench-warrant, for treason, the Court will commit him, without stating when or where he is to answer for the offence. *United States v. Bollman and Swartwout*, 373.
3. Upon an attachment of contempt the marshal cannot detain the party after the return-day of the attachment, unless by an order of commitment by the Court. *Ex parte Burford*, 456.
4. A constable, having a warrant to arrest a man for assault and battery, has a right to break open the door of the offender's dwelling-house, to arrest him. *United States v. Faw*, 487.
5. An officer having a warrant against a person, already in his custody, may hold him under it without informing him that he is arrested upon it. *United States v. Omeara*, 165.

ASSAULT AND BATTERY.

1. In a joint assault and battery, a recovery in an action against one is a bar to an action against the other. *Swope v. Courtney*, 33.
2. A man cannot lawfully push another off from his land without first requesting him to go off. *Thompson v. Berry*, 45.
3. Assault and battery by a seaman upon the master of a vessel does not amount to a confinement of the master, nor to an attempt to excite a revolt, within the Act of Congress. *United States v. Lawrence*, 94.
4. In assault and battery, upon the plea of "not guilty," the plaintiff is not bound to prove that the defendant struck or assaulted him first; but upon the plea of *son assault demesne* the defendant must prove that the plaintiff assaulted him first. *Stevens v. Lloyd*, 124.
5. If a man is present and encouraging an assault and battery, he is a principal. *United States v. Ricketts*, 164.
6. Mechanics, who are building a house, have a right to remove gently all persons who come into the building without authority. *United States v. Bartle*, 236.
7. In assault and battery for beating the plaintiff's servant *per quod*, &c., the plaintiff cannot recover without evidence of loss of service. *Voss v. Howard*, 251.
8. It is an assault to double the fist and run it at another, saying, "if you say so again I will knock you down." *United States v. Myers*, 310.
9. In assault and battery, the affidavit to hold to bail must state some specific injury to the person of the plaintiff; and must be positive as to some amount of damages. *Mecklin v. Caldwell*, 400.
10. A constable, having a warrant to arrest a man for assault and battery, has a right to break open the door of the offender's dwelling-house to arrest him. *United States v. Faw*, 487.
11. If a mortal stroke be given in Alexandria, and the death happen in Maryland, this Court has not jurisdiction of the offence as a homicide; but has jurisdiction of the assault and battery. *United States v. Bladen*, 548.

ASSETS.

The proceeds of sales of lands sold under a will, to pay debts, are equitable assets. *Dixon v. Ramsay*, 496.

ASSIGNEE.

1. If the assignee of the lessee bind himself to the lessee to pay the rent to the lessor, the lessor may maintain an action of debt against the assignee for the rent, although the assignment be not acknowledged or proved and recorded agreeably to the Virginia act of 13th December, 1792, "for regulating conveyances." *Cooke v. Myers*, 6.
2. An action brought by a bankrupt is not abated by substituting the name of the assignee as plaintiff. *Wise v. Decker*, 190.

ASSIGNMENT.

1. A release by an assignee of a chose in action is a bar to an action by the assignor for the same cause of action. *Dade v. Herbert*, 85.
2. The plaintiff suing as assignee of a bankrupt, must produce the commission and proceedings and deed of assignment. *McIver v. Moore*, 90.
3. A draft drawn by a bankrupt, not payable out of any particular fund, is not such an assignment of the money in the hands of the drawee, as will give the holder a right to the money, before the acceptance of the draft. *Dickey v. Harmon*, 201.

ASSIGNMENT, (*Continued.*)

4. The assignees of a British bankrupt cannot maintain a suit in their own names, in Maryland, against a debtor of the bankrupt; and it seems that a promise to pay the money to them would be void for want of a consideration. *Perry et al. v. Barry*, 204.
5. A legal plaintiff has a right to dismiss a suit brought in his name by order of a person who claims to be his assignee; and the Court will not interfere to protect the assignee unless the evidence of the assignment is clear. *Welch v. Mandeville*, 489.

ASSUMPSIT.

1. *Indebitatus assumpsit* lies upon the judgment of a justice of the peace. *Green & English v. Fry*, 137.
2. The plaintiff cannot recover upon a general *indebitatus assumpsit*, if a special agreement be proved. *Krouse v. Deblois*, 138.
3. A promise in writing, made under a supposed legal liability which did not exist, is void for want of consideration. *Offutt v. Parrott*, 154.
4. Assumpsit will not lie at common law on a parol demise. The Statute of 11 Geo. 2, c. 19, is not in force in Virginia. *Wise v. Decker*, 171.
5. An implied assumpsit is only coextensive with the consideration. An implied assumpsit in consideration of assets alone, is a promise as administrator. *Courtney v. Hunter's Adm'r*, 265.
6. *Indebitatus assumpsit* will lie for money due upon a special contract executed on the part of the plaintiff. *Hyde v. Liverse*, 408.
7. An acknowledgment, or promise, made by the defendant under ignorance of the fact, or of the law, by which he was discharged, is not binding. *Thornton v. Stoddert*, 534.

ATTACHMENT.

1. A clerk of this court is not entitled to sue by attachment of privilege. *Forrest v. Hanson*, 12.
2. Goods in the hands of an officer under a distress for rent may be attached by the same landlord for rent not yet due, and may be condemned, although replevied by the tenant after distress levied. *Herbert v. Ward*, 30.
3. This court has not jurisdiction by attachment, in Alexandria, for a sum less than \$20. *Rutter v. Merchant*, 36.
4. An attachment issued upon a return of *non est* before the return-day, will be quashed. *Camilloz v. Johns*, 38.
5. A *fieri facias* received by the marshal before an attachment for rent not due, is entitled to priority, and must be first satisfied. *Stieber v. Hoyer*, 40.
6. An attachment lies in Alexandria against an absconding debtor, under the Virginia law of 26th December, 1792. *Allen v. Greenwood*, 60.
7. Attachment for non-payment of the costs of a continuance will not be granted against a defendant against whom final judgment in the cause has been rendered. *McGill v. Shehee*, 62.
8. No subpoena for attachment in chancery shall issue before bill filed. *General Rule*, 89.
9. Under the Statute of Virginia, goods, not upon the premises, may be attached to secure rent not yet due. *Brockett v. Johns*, 100.
10. When a cause is continued at the costs of a party, no execution can issue for them. The remedy is an attachment of contempt. *Fenwick v. Voss*, 106.
11. In a chancery attachment against a British bankrupt, the Court will permit the assignees to appear and release the attached effects, and to defend the suit, on their producing a notarial copy of the commissioners' proceedings. *Wilson v. Stewart*, 128.
12. An attachment of contempt for not attending as a witness must not be served in the court-house. If the witness arrives before service of the attachment and makes a reasonable excuse, the Court will countermand the attachment, on payment of the cost of issuing it. *Davis v. Sherron*, 287; *United States v. Scholfield*, 130.
13. An attachment of contempt in disobeying an injunction. *Munroe v. Harkness*, 157; *Munroe v. Bradley*, 158.
14. The defendant cannot appear to a chancery attachment in Virginia, without giving bail. *Mayor and Commonalty v. Cooke et al.* 160.

ATTACHMENT, (*Continued.*)

15. In a chancery-attachment in Virginia, the Court may order the attached debt to be paid over to the plaintiff on his giving security to refund, &c., although the plaintiff's right may be doubtful. *Wilson v. Dandridge*, 160.
16. A defendant discharged under the insolvent law of Pennsylvania, may appear here and discharge an attachment without giving special bail. *Davis v. Marshall*, 173.
17. The garnishee in a chancery-attachment, may, by leave of the Court, answer, after bill taken for confessed. *Hartshorne v. Allison et al.* 199.
18. A witness cannot have an attachment for his fees until he has served an order of the Court on the party to pay them. *Sadler v. More*, 212.
19. In a judgment upon an attachment, interest cannot be added. *Power v. Semmes*, 247.
20. An acceptance by the garnishee, of the defendant's draft in favor of a third person, before service of the attachment, binds the garnishee, and cannot be overreached by the attachment. *Tucker v. Marsteller*, 254.
21. Under the bankrupt law an attaching creditor was entitled to only a ratable part of his debt with the other creditors; and that part was to be ascertained by the assignees under the direction of the commissioners. *Harmon et al. v. Jamesson*, 288.
22. A chancery-attachment will not lie, in Virginia, to charge the effects of a deceased foreign debtor in the hands of a resident defendant. *Redfern v. Rumney*, 300.
23. Upon an attachment under the Maryland Act of 1795, c. 56, the plaintiff must prove his debt before he can obtain judgment of condemnation. *Stephenson v. Giberson*, 319.
24. *Quere*, whether attachment lies for unliquidated damages. *Ibid.*
25. To obtain an attachment under the Maryland Act of 1795, c. 56, it is not necessary that all the plaintiffs should make affidavit, nor that it should appear that they are all citizens of the United States. *Birch v. Butler*, 319.
26. A writ of attachment and *capias* may be amended, with leave of the Court, before condemnation. *Ibid.*
27. This court has power to send an attachment into Virginia for a witness in a civil cause, who lives within one hundred miles of the place of trial; and such attachment is to be directed to, and served by the marshal of Virginia. *Voss v. Luke*, 331.
28. The Court will not continue a cause for the absence of a witness who has been summoned, and who lives within one hundred miles of the place of trial, if no attachment has been moved for, although he resides out of this district. *Wood v. Young*, 346.
29. The goods of an intestate cannot be attached by his creditors; nor will a chancery-attachment lie against the effects of a resident debtor. *Patterson v. McLaughlin*, 352.
30. A deposition *de bene esse* cannot be read in evidence if the witness lives within one hundred miles of the place of trial, although he lives out of the district. *Park v. Willis*, 357.
31. An attachment will not lie for non-payment of the costs of a continuance, until after a rule to show cause; nor unless there has been a personal service of the order of the Court to pay the costs, nor unless the bill of costs state the particular items. *Dyson v. White*, 359.
32. *Quere*, whether the Court can issue an attachment for a witness residing in Virginia, less than one hundred miles from this district. *Lewis v. Mandeville*, 360.
33. The Court will not grant an attachment against a party for not paying his witness, unless payment was demanded by a person having authority to receive payment; and that authority must appear. *Nally v. Lambell*, 365.
34. An attachment for not returning a writ of *habeas corpus*, will not be issued until three days shall have expired after the service of the writ. *United States v. Bollman et al.* 373.
35. In a chancery-attachment, if the subpœna be served on the principal, the bill cannot be taken for confessed for non-appearance as in ordinary cases in equity, but there must be an affidavit and publication, &c., according to the Virginia Act of 26th December, 1792. *Dean v. Legg et al.* 392.
36. Under the laws of Virginia, a *ne exeat* will not lie to restrain a garnishee. *Patterson v. Bowie et al.* 425.

ATTACHMENT, (*Continued.*)

37. The Court will grant a rule on a witness, living in Baltimore, to show cause why he should not be attached for not attending according to summons. *Hodgson v. Butts*, 447.
38. Upon an attachment the marshal cannot hold the party after the return-day, unless by an order of commitment. *Ex parte Burford*, 456.
39. The Court will send attachments into Maryland for witnesses who reside within one hundred miles of Washington, if they fail to attend according to summons. *Sommerville v. French*, 474.
40. The proceedings in an attachment, upon an assigned cause of action, must be in the name of the legal plaintiff; and all the requisites of the statute must be complied with. *Davis v. Wyer*, 527.

AUTHENTICATION.

The acts of Congress respecting the authentication of the records of State courts do not apply to the records of the courts of the United States. *Mason v. Lawrason*, 190.

AUTHORITY.

1. The authority of an agent need not be in writing, and may be proved by the testimony of the agent himself. *United States v. Baker*, 268.
2. In an action by the indorsee against the maker of a promissory note, the plaintiff need not produce written evidence of the authority of the indorser's agent to indorse. *Miller v. Moore*, 471.
3. After appearance entered at a previous term it is too late to call for the authority to appear. *Rogers v. Crommelin*, 536.

BAIL.

1. Special bail will not be required upon setting aside an office judgment, if appearance-bail was not required. *Shean v. Towers*, 5.
2. Bail will not be required in an action against an indorser by his immediate indorsee, while another action is pending against him by a remote indorsee. *Johnson v. Harris*, 35.
3. Bail cannot be required of a *feme covert* in a civil action. *Henry v. Cornelius and wife*, 37.
4. A motion to appear without bail will not be heard before the appearance-day, if the defendant be not in actual custody. *Olive et al. v. Mandeville*, 38.
5. It is no plea to *scire facias* against bail, that the principal had been confined in prison, in another jurisdiction ever since the judgment. *Gadsby v. Miller*, 39.
6. Bail is not discharged by a discontinuance of the action at the rules, if it be reinstated. *Ibid.*
7. In slander, bail is not required, if the affidavit does not state the words spoken, and that the defendant is about to leave the district. *Lanstraaz v. Powers*, 42.
8. After plea by appearance-bail, the defendant may give special bail and plead *de novo*. *Pickett v. Lyle*, 49.
9. The Court will not interfere to prevent bail from seizing the principal further than to keep order in court. *Smith v. Catlett*, 56.
10. Bail may be required in trespass for cutting up a boat. *Voss v. Tuel*, 72.
11. Upon calling the appearance-docket, if the defendant offers to appear, the Court will not give the plaintiff's attorney time to procure an affidavit to hold the defendant to special bail. *Meade v. Roberts*, 72.
12. A discharge of the principal under a commission of bankruptcy, issued after the return of the *scire facias* against the bail, is no discharge of the bail. *Bennett v. Alexander*, 90.
13. Bail residing in Alexandria county cannot be received in an action in Washington county. *Cunningham v. Lacy*, 101.
14. Where two become bail jointly and severally, and two writs of *scire facias* are issued, and one of the bail surrenders the principal, he must pay the costs upon both writs of *scire facias*. *Pennington v. Thornton*, 101.
15. The Court will not commit a bankrupt, for want of bail, who has surrendered to the commissioners, and whose examination is not closed, although the forty-two days have expired. *Lingan v. Bayley*, 112.
16. In an action against a certificated bankrupt, by an indorser who has paid the money since the date of the certificate, the bankrupt will be permitted to appear

BAIL (*Continued.*)

- without special bail; the note having become payable before any dividend made, and provable by the holder, under the commission. *Baker et al. v. Vasse*, 194.
17. A recognizance of bail, in a civil action, taken out of court, is only *de bene esse*; and the marshal, to save himself, must take a bail-bond in all cases. *Poe v. Mounger*, 145; *Bennett v. Pendleton*, 146.
18. The defendant cannot appear to a chancery-attachment, in Virginia, without giving special bail. *Mayor and Commonalty v. Cooke et al.* 160.
19. A defendant, discharged under the Insolvent Law of Pennsylvania, may appear here and discharge an attachment without giving special bail. *Davis v. Marshall*, 173.
20. The defendant may give special bail at any time during the return term, although the plaintiff may have taken an assignment of the bail-bond. *Rhodes v. Brooke*, 206.
21. Officers of the Court cannot be bail without leave. *General Rule*, 246.
22. Bail will not be discharged by a surrender of the principal, or the production of his discharge as an insolvent, at the third term after the return of the *scire facias*. *Bowyer v. Herty*, 251.
23. The administrator of appearance-bail cannot be allowed to appear as appearance-bail and plead for the principal. *Finley v. McCarthy*, 266.
24. If there be no declaration the Court will not require special bail unless the plaintiff appears at the return of the writ. *Thompson v. Carenough*, 267.
25. An affidavit to hold to bail must be positive. *Smith v. Watson*, 311.
26. An affidavit, in the form of that required by the Act of Maryland of 1729, is sufficient to hold the defendant to bail. *Graham v. Konkapot*, 313.
27. If bail has not been required upon the *capias ad respondendum*, it will not, upon setting aside the office-judgment, be required without affidavit. *Gordon v. Riddle*, 329.
28. In Virginia, special bail, in an action of debt upon a judgment, cannot be required by the indorsement of an attorney. *Wray v. Riley*, 361.
29. Affidavit by an administratrix to hold to bail. *McLaughlin v. Johns*, 372.
30. Affidavit, "according to his knowledge and belief," is not sufficient to hold to bail. *Jolly v. Rankin*, 372.
31. An affidavit to hold to bail in assault and battery, must state some certain amount of damages. *Mecklin v. Caldwell*, 372.
32. In assault and battery, the affidavit to hold to bail must state some specific injury to the person of the plaintiff, and must be positive as to some amount of damages. *Ibid.* 400.
33. Affidavit that the defendant is justly indebted to the plaintiff for 1000 lbs. of crop tobacco is sufficient to hold the defendant to bail. *Greenleaf v. Cross*, 400.
34. A bond filed for payment of money, is sufficient to hold the defendant to bail. *Aldridge v. Drummond*, 400.
35. The Court will not order the defendant's appearance to be struck out so as to charge the marshal. *Wood v. Dixon*, 401.
36. A creditor may resort to his collateral security, although he has taken and discharged the bail of his principal debtor upon a *ca. sa.* *Hartshorne v. McIver*, 421.
37. Upon surrender of the principal to the sheriff, by the bail, under the law of Virginia, notice must be given immediately to the creditor, his attorney or agent. The knowledge of the plaintiff's attorney is not sufficient. *Maynadier v. Wroe*, 442.
38. When a bond for the payment of money is filed, an affidavit to hold to bail is not necessary; and the court will not mitigate bail, upon affidavit that the whole is not due; nor receive as bail persons not residing in the district. *Lee v. Welch*, 477.
39. The discharge of the principal under the insolvent act before the return-day of the *ca. sa.* may be pleaded in bar to a *scire facias* against the bail. *Byrne v. Carpenter*, 481.
40. A justice of the peace cannot discharge a prisoner who has been committed for trial on a charge of felony; nor can he take money in lieu of bail. *United States v. Faw*, 486.
41. After plea of misnomer in abatement, the court will not suffer the record to be

BAIL, (Continued.)

- amended but upon payment of costs, and a discharge of the bail. *Payen v. Hodgson*, 508.
42. A resident of Alexandria may be held to bail in Washington in an action of debt founded upon a judgment in an action of debt in Virginia, in which bail was given, although no previous writ had been issued against the defendant in Alexandria county. *Gordon v. Lindo*, 588.
 43. The Court will not, upon affidavit of want of merits, dispense with special bail. *Ibid.*

BANK OF ALEXANDRIA.

1. The Bank of Alexandria under its charter, had a right to have its causes tried at the first term; and to have the writ returned during the term. *Bank of Alexandria v. Henderson*, 167.
2. The Bank of Alexandria, under its first charter, could maintain an action against an indorser of a note made negotiable at that bank, without first bringing suit against the maker. *Bank of Alexandria v. Wilson*, 168.
3. The Bank of Alexandria, under its old charter was entitled to judgment at the first term. *Bank of Alexandria v. Davis*, 262. *Bank of Alexandria v. Young*, 458.
4. The charter of the Bank of Alexandria, is a public act. *Ibid.*
5. The Bank of Alexandria, in discounting notes, may deduct the whole interest for the whole time they have to run. *Bank of Alexandria v. Mandeville*, 552.

BANK-NOTE.

1. *Quære*, whether stealing a bank-note is larceny within the act of Congress of 1790, April 30, § 16. *United States v. Murray*, 141.
2. Bank-notes are not goods and chattels. *United States v. Morgan*, 278.
3. An indictment, upon the Maryland Act of 1793, c. 35, must state of what bank the stolen notes were, and whether the bank was incorporated by the United States or by a particular State. It is not sufficient to aver in the terms of the act. *United States v. Porte*, 369.

BANK OF THE UNITED STATES.

Quære, whether a check drawn upon "the office of discount and deposit, Washington" is evidence to support an averment of a check drawn on "the Bank of the United States." *United States v. Wilson*, 104.

BANKRUPT.

1. A discharge of the principal under a commission of bankruptcy issued after the return of the *scire facias* against the bail, is no discharge of the bail. *Bennett v. Alexander*, 90.
2. The plaintiff suing as assignee of a bankrupt, must produce the commission and proceedings and deed of assignment. *McIver v. Moore*, 90.
3. The court will not commit a bankrupt for want of bail, who has surrendered to the commissioners, and whose examination is not closed, although the 42 days have expired. *Lingan v. Bayley*, 112.
4. In a chancery attachment against a British bankrupt, the court will permit the assignees to appear and release the attached effects and defend the suit on their producing a notarial copy of the commissioners' proceedings. *Wilson v. Stewart*, 128.
5. A bankrupt, surrendered by his bail during the time allowed for his examination, will not be committed in execution. *Foxall v. Levi*, 139.
6. In an action, against a certificated bankrupt, by an indorser who has paid the money since the date of the certificate, the bankrupt will be permitted to appear without special bail; the note having become payable before any dividend made, and provable by the holder under the commission. *Baker et al. v. Vasse*, 194.
7. Bankruptcy of the plaintiff cannot be proved by parol. *Moore v. Voss*, 179.
8. Evidence cannot be given to show that the commissioners of bankruptcy erred in their judgment. *Sutton v. Mandeville*, 187.
9. The writ is not abated by substituting the assignee as plaintiff in place of the bankrupt. *Wise v. Decker*, 190.
10. A copy of the proceedings of the commissioners of bankrupt in England is not evidence under the Act of Virginia, because not recorded in England so as to make the proceedings evidence there. *Leay et al. v. Wilson*, 191.

BANKRUPT, (Continued.)

11. A note, given before the bankruptcy of the maker, payable after, and taken up by the payee (the indorser) before final certificate, may be proved under the commission. *Baker et al. v. Vasse*, 194.
12. A draft drawn by a bankrupt, not payable out of any particular fund, is not such an assignment of the money in the hands of the drawee as will give the holder a right to the money before the acceptance of the draft; it is at most only a security, and does not entitle the holder to be relieved for more than a ratable part of his claim. *Dickey et al. v. Harmon et al.* 201.
13. The assignees of a British bankrupt cannot maintain a suit in their own name, in Maryland, against a debtor of the bankrupt. And it seems, that a promise to pay the money to them would be void for want of a consideration. *Perry et al. v. Barry*, 204.
14. If there be judgment for one of several defendants upon a demurrer to his separate plea of bankruptcy, he may be examined as a witness for the other defendants, upon executing a release of his interest in his estate. *Hurliki's Adm. v. Bacon et al.* 340.
15. A defendant, under the bankrupt law, cannot set off a debt due to him from a partnership against a claim by the assignee of one of the firm who became bankrupt. *Oxley v. Tucker*, 419.
16. A bond due by the bankrupt to the defendant cannot be set off against the defendant's note to a third person assigned to the assignee of the bankrupt's effects after commission issued. *McIver v. Wilson*, 423.
17. A surety who had paid money for a bankrupt in discharge of a duty-bond, has not the right of the United States to proceed against the person of the bankrupt, but only against his effects. *Kerr v. Hamilton*, 546.
18. Under the bankrupt law, an attaching creditor was entitled to only a ratable part of his claim with the other creditors; and that part was to be ascertained by the assignees under the direction of the commissioners. *Harmon & Davis's Assignees v. Jamesson*, 288.

BARON AND FEME.

1. Bail cannot be required of a *feme covert* in a civil action. *Henry v. Cornelius & wife*, 37.
2. The wife of him whose goods were stolen is not a competent witness for the prosecution unless the husband has released to the United States his share of the fine. *United States v. Shorter*, 315.
3. A *feme covert* may be naturalized. *Ex parte Marianne*, 372.
4. A marriage settlement of the intended wife's goods, although not recorded, protects the goods from the creditors of the husband. *Pierce v. Turner*, 462.
5. The husband is not liable for goods sold and delivered to his wife upon her credit after a separate maintenance allowed by him; but from the defendant's express promise to pay, the jury may infer that the goods were delivered to his wife by his order, unless such inference is rebutted by proof that the original credit was given to her. *Shreve v. Dulany*, 499.
6. A selling by the wife, with the assent of the husband, is a selling by the husband. *United States v. Birch*, 571.
7. The wife of one of the defendants is not a competent witness for the plaintiff, although her husband has been discharged under the insolvent act. *Bank of Alexandria v. Mandeville*, 575.

BASTARD.

1. This court in Alexandria, has jurisdiction to require the father of a bastard child to give security for its support. *Ross v. Kingston*, 140.
2. The mother of a bastard is a competent witness for the United States on an indictment of the supposed father, under the Maryland Act of 1781, c. 13, and may be cross-examined as to her connection with other persons. *United States v. Collins*, 592.
3. Evidence of the likeness of the child, to its supposed father is not admissible. *Ibid.*
4. The only judgment which the court can give under the statute of Maryland 1781, c. 13, is that the defendant give security to indemnify the county for any charge for the maintenance of the child. *Ibid.*

BENCH WARRANT.

The court will issue a bench-warrant against a person charged with treason, upon *ex parte* affidavits, before any presentment or indictment. *United States v. Bollman and Swartwout*, 373.

BIGAMY.

On an indictment for bigamy, a person who has an action pending against the prisoner for goods furnished to the supposed first wife, is not a competent witness to prove the first marriage. *United States v. Maxwell*, 605.

BILLS AND NOTES.

1. To charge an indorser, in Virginia, it is necessary for the plaintiff to show that he instituted his suit against the maker in due time, and prosecuted it diligently to an ineffectual execution. *Mandeville v. McKenzie*, 23.
2. In Virginia, the indorsee of a promissory note may recover at law against a remote indorser; and it is not necessary that he should have given the defendant notice of the non-payment by the maker, nor of his insolvency. *Dunlop v. Silver*, 27.
3. If the holder of a note receive an inland bill of exchange for the money due on the note, it is a discharge of the note unless the parties otherwise agree. *Ibid.*
4. In Virginia, debt lies by the indorsee of an inland bill against the acceptor. *Vowell v. Alexander*, 33.
5. In an action against the indorser of a foreign bill of exchange, for non-payment, it is not necessary to produce a protest for non-acceptance. *Hodgson v. Turner*, 74.
6. Debt will lie against the maker of a promissory note. *Gardner v. Lindo*, 78.
7. An action for money had and received can be maintained under the laws of Virginia, by an indorsee against a remote indorser of a negotiable promissory note. *Riddle v. Mandeville*, 95.
8. The indorser, at Alexandria, of a foreign bill of exchange to a merchant in New York is only liable for damages according to the laws in Alexandria. *Lenox v. Wilson*, 170.
9. If the agent of the drawee of a bill write an order on the back of it to another person to pay it, this order is evidence of the drawee's acceptance of the original bill. *Harper v. West*, 192.
10. Where there are two joint indorsers, notice must be given to both. *Gantt v. Jones*, 210.
11. If one of the joint indorsers pay the note, he cannot recover a moiety from the other indorser, unless he was liable to pay the note. *Ibid.*
12. Notice to an indorser is necessary unless he knew the maker to be insolvent at the time of indorsement. *Morris v. Gardner*, 213.
13. Where the parties live within two miles of each other, nine days' delay is fatal. *Ibid.*
14. A subsequent promise made by the defendant, with full knowledge of his discharge, will bind him. *Ibid.*
15. The maker is a competent witness for the indorser. *Bank of Columbia v. French*, 221.
16. The indorser for the accommodation of the maker of a note is not entitled to strict notice, unless he has sustained damage by the want of notice. *Ibid.*
17. An indorser for the accommodation of the maker cannot object the want of consideration. *Ibid.*
18. The holder of a bill before protest is not affected by a settlement between the drawer and the payee. *Cox v. Simms*, 238.
19. In an action upon protest for non-payment, it is not necessary to show a protest for non-acceptance, nor to have given notice of non-acceptance. *Ibid.*
20. Reasonableness of notice is to be decided by the jury. *Ibid.*
21. In an action by the payee of a bill having two subsequent indorsements in full, it is not necessary for the plaintiff to show a new assignment to himself. *Ibid.*
22. If the drawer has no funds in the hands of the drawee, he is not entitled to notice of non-payment. *Ibid.*
23. An order, payable out of a particular fund, and not negotiable, is not payment of a preceding debt. *Governor of Virginia v. Turner*, 261.
24. It is necessary that the holder of a foreign bill, protested for non-acceptance, should give notice of the protest as soon as possible under all the circum-

BILLS AND NOTES, (*Continued.*)

- stances, according to the usual course of communication. *Lindenberg v. Wilson*, 340.
25. In time of war duplicate notices of protest of a bill of exchange should be sent. *Phillips v. Jannéy*, 502.
 26. If the holder of a bill of exchange be beyond seas at the time his cause of action accrues, and so continues till suit brought, the statute of limitations is no bar, although the indorser was always a resident of the United States. *Irving v. Sutton*, 567.
 27. A Virginian, indorser of a bill of exchange drawn in Barbadoes, is liable to 15 per cent. damages under the law of Virginia. *Pomery v. Slacum*, 578.
 28. Notice of protest, of a foreign bill, must be given before suit brought. *Ibid.*
 29. If the drawer and payee of a check upon a bank reside in the town where the bank is, and the drawee be insolvent, the jury cannot in law, infer from those facts, that the plaintiffs had used due diligence in demanding payment and giving notice to the defendant. *McKinder et al. v. Dunlap*, 584.
 30. If the defendant has received the proceeds of the plaintiff's note discounted with the defendant's indorsement, the plaintiff cannot recover the amount unless he has paid and produces the note, or accounts for its non-production. *Gillis v. Van Ness*, 369.
 31. Under the laws of Virginia, in an action against the indorser of a promissory note, the plaintiff, to excuse himself for not having first brought suit against the maker, must show him to be insolvent at the time of bringing the suit; and in order to recover, must have given reasonable notice of non-payment by the maker; and the jury is to decide whether the notice was reasonable. *McIver v. Kennedy*, 424.
 32. In an action, in Virginia, by the indorsee against the indorser of a promissory note, if the maker is insolvent, it is not necessary that the plaintiff should have first sued the maker, although, at the time of bringing the suit, the maker had, in his hands, goods and chattels more than enough to pay the debt. *Vowell v. Lyles*, 428.
 33. If the defendant indorse the note to give it credit, no other consideration is necessary to support the action against the indorser. *Ibid.*
 34. A blank indorsement may be filled up at the bar, after the jury is sworn; and the indorsement so filled up is *prima facie* evidence of a good consideration. *Ibid.*
 35. If a promissory note, payable to A or order, be indorsed in blank by B, and by A. (B's name being written over A's) the plaintiff has not a right, at the trial, to fill the blanks by an indorsement from A. to B. and from B. to the plaintiff; there being no evidence that such was the intention of the parties, except the note and the blank indorsements. *Quere. Cooke v. Weightman*, 439.
 36. In Virginia, the insolvency of a maker of a promissory note, excuses the holder for not suing him, before suing the indorser. *Patten v. Violette*, 463.
 37. An indorsement of a blank paper with intent to give credit to the maker of a promissory note which should afterwards be written thereon, is obligatory, although no other consideration passed from the indorsee to the indorser, and authorized the maker to make the note in the manner intended at the time of the indorsement. *Ibid.*
 38. It is no bar to the plaintiff's recovery, that the maker of the note, had, at the time it became payable, property enough to pay this debt; and that he and the plaintiff both resided in the same town, and that the plaintiff brought no suit against the maker. The insolvency which will excuse the plaintiff for not bringing suit against the maker must be such as in the opinion of the jury would render a suit fruitless. *Ibid.*
 39. If the maker was solvent when the note became payable, and the defendant, during such solvency, requested the plaintiff to sue the maker, and he did not, the defendant is discharged from liability, under the equity of the Statute of Virginia. *Ibid.*
 40. A bill of exchange may be accepted by writing upon it the word "excepted." *Miller v. Butler*, 470.
 41. The acceptor of a bill of exchange given for the amount of an award cannot avail himself of a mistake of the arbitrators in making up their award. *Ibid.*
 42. In an action by the indorsee against the maker of a promissory note, the plain-

BILLS AND NOTES (*Continued.*)

- tiff need not produce written evidence of the authority of the indorser's agent, to indorse. *Miller v. Moore*, 471.
43. In an action against an indorser of a promissory note a record of a judgment, upon the same note, between other parties, cannot be given in evidence, unless the note itself be produced, and the defendant's indorsement proven. *Welsh v. Lindo*, 497.
 44. If a person, who is not a party to a promissory note, indorses his name upon it in blank, with intent to give it credit, the plaintiff may write over it an engagement to pay it in case of the insolvency of the maker; and such indorser may insist on the usual demand and notice. *Offutt v. Hall*, 504.
 45. If Saturday be the last day of grace, a demand on the following Monday is too late. *Thornton v. Stoddert*, 534.
 46. If the defendant indorsed as surety he is entitled to strict demand and notice; if he is jointly interested with the maker, he is not. *Ibid.*
 47. A count, upon the indorsement of a promissory note not payable to order, without averring a consideration for the indorsement, is bad in Virginia. *Janney v. Geiger*, 547.
 48. A plea that the maker of the note had, at the date of the writ, goods and chattels to a greater amount than the plaintiffs' claim, is no answer to an averment of insolvency. *Ibid.*
 49. Notice of non-payment by the maker of a promissory note, not payable to order, is not necessary to charge the assignor, in Virginia. *Ish v. Mills*, 567.
 50. An intent to give credit to a note is a good consideration for an indorsement. *Offutt v. Hall*, 572.
 51. Insolvency of the maker of a note, in Virginia, dispenses with a suit against him; and also with demand and notice. *Ibid.*
 52. In an action by the indorsee against the maker of a promissory note, the defendant may set off the payee's note to him, which he held before and at the time he had notice of the assignment of his own note to the plaintiff, although not then payable, but becoming payable before his own note. *Stewart v. Anderson*, 586.
 53. A request, by the indorser of a note, to the holder, to push the maker, is not evidence of a waiver of demand and notice; but is evidence from which the jury may infer due demand and notice. *Riggs v. St. Clair*, 606.
 54. The insertion of the words, "value received," after indorsement, does not avoid the note, unless done with the privity of the plaintiff. *Ibid.*

BILL OF EXCEPTIONS.

The Court will not sign a bill of exceptions which states that it contains all the evidence in the cause, unless, &c. *Lyles v. Mayor & Com. of Alexandria*, 361.

BOND.

1. A defective forthcoming bond will, at the plaintiff's request, be quashed; as well as the execution upon which it was founded. *Sutton v. Mandeville*, 32.
2. Upon a bond conditioned to pay certain instalments, an action may be brought upon failure to pay the first instalment. *Nailor v. Kearney*, 112.
3. A forthcoming bond given, by mistake, for a sum less than the judgment, may be quashed, with the execution, upon the plaintiff's motion, on payment of the costs of the motion. *Stephens v. Lloyd*, 141.
4. The marshal may include his commissions in a forthcoming bond; and is also entitled to his commissions upon an execution on the bond. *Thomas v. Brent*, 161.
5. The adding of a new surety without the consent of the others, makes the bond void. *Long v. O'Neale*, 233.
6. Sureties of an insolvent debtor in a duty-bond are not entitled to judgment at the first term against their principal. *Johns v. Brodhag*, 235.
7. In an action upon a bond conditioned to pay money by instalments, if the verdict be rendered before all the instalments are due, the jury must find how much is due upon each instalment, and when payable; as well those to become payable as those already payable. *Davidson v. Brown*, 250.
8. Covenant will not lie upon the condition of an injunction-bond. *Summers v. Watson*, 254.
9. It is not necessary that the forthcoming bond should recite the return of the ex-

BOND, (Continued.)

- education, nor the certificate of the service; nor the name of the person by whom it was served; but it must state that the execution was served. *Ambler v. McMechen*, 320.
10. A mistake in calculating the marshal's fees in a forthcoming bond may be cured by a release; and judgment may be rendered for the true sum. *Ibid.*
 11. A prison-bonds bond may be assigned by a deputy marshal, in Alexandria. *Scott v. Wise*, 473.

BOOKS OF ACCOUNT.

1. The party's own books of account are not evidence in his favor, although in the handwriting of a deceased clerk, unless they contain the first entry of the charges. *Fendall v. Billy*, 87.
2. The defendant's book of account in his own handwriting, is not evidence for him, although it contains the first entry. *Bennett v. Wilson*, 446.

BRICKS.

A clamp is not a kiln. *Washington v. Wheat*, 410.

BRITISH TREATY.

1. The statute of limitations is not a bar to a British debt contracted before the treaty of peace. *Dunlop v. Alexander*, 498.
2. A British creditor who took a bond from his debtor payable to a citizen of the United States, cannot avoid the statute of limitations, under the clause of the treaty removing all legal impediments, &c. *Auld v. Hoyle*, 544.

BY-LAW.

1. If the information upon a by-law states that the penalty accrued to the Commonwealth when, by the charter, it accrued to the town, the judgment must be arrested. *Commonwealth v. Hooff*, 21.
2. The Alexandria by-laws of 1784, apply to the subsequent addition made to the town. *Commonwealth v. Smith*, 47.
3. No information or indictment will lie upon a by-law of the corporation of Alexandria. *Commonwealth v. Howard*, 61.
4. The original by-laws of Georgetown need not be made under the seal of the corporation. *Holmead v. Fox*, 138.
5. A warrant to recover the penalty of a by-law must name the plaintiffs by their corporate name, and must describe the offence with reasonable certainty. *Barney v. Washington*, 248.
6. The mayor of Washington cannot exercise jurisdiction in a case in which he is a party. *Ibid.*
7. Burning bricks in a clamp, is not a violation of a by-law against burning bricks in a kiln. *Washington v. Wheat*, 410.
8. A by-law approved on the 27th, will not support an averment of a by-law passed on the 26th. *Common Council of Alexandria v. Brockett*, 505.

CAPIAS.

1. A *capias* is the proper process upon an indictment for misdemeanor found in Alexandria, after a summons to show cause why an indictment or information should not be filed. *United States v. Veitch*, 81.
2. Upon surrender of the debtor upon a *ca. sa.* the Court will not, without motion, order him to be committed in execution. *Peter v. Suter*, 311.

CASE.

1. A person who has a right to do an act, has a right to use the necessary means. *Hooe v. Mayor & Commonalty of Alexandria*, 98.
2. In an action upon the case under the Virginia Act of 25th January, 1798, § 6, against the master of a vessel for carrying away the plaintiff's slave, the defendant is not liable, unless he knew that the slave was on board. *Lee v. Lacey*, 263.
3. In an action upon the case against the owner of a stage-coach for taking away the plaintiff's slave, evidence may be given on the part of the defendant, that the plaintiff had given the slave a written permission to seek a new master; and if such permission be without limitation of time or place, the plaintiff cannot recover. *Harrison v. Evans*, 364.

CASE, (*Continued.*)

4. In an action upon the case against a deputy-postmaster, the instructions of the postmaster-general may be given in evidence. *Dunlop v. Munroe*, 536.
5. Deputy-postmasters are civilly liable for the acts of their servants and clerks; but the neglect of the servant or clerk cannot be given in evidence upon a count charging the loss to have been incurred by the neglect of the deputy-postmaster himself. *Ibid.*

CASUALTY.

- A casualty happening against the will and without the negligence or other default of the party, is, as to him, an inevitable casualty. *Hodgson v. Dexter*, 109.

CERTIORARI.

1. In forcible entry and detainer, it is not necessary that it should appear upon *certiorari* that the inquest was taken on the spot where the force was used; nor that the jurors should appear to be qualified according to the requisites of the common law. *United States v. Donahoo*, 474.
2. In Alexandria county, a *certiorari*, in forcible entry and detainer, may be issued by one judge in vacation; and the inquisition may be traversed. No plea will be allowed but a traverse of the force or a possession for three years. *United States v. Browning*, 500.

CHALLENGE.

1. Peremptory challenge is allowed only in capital cases, in Alexandria. *United States v. Carrigo*, 49.
2. The Court will not ask a juror before he is sworn whether he has formed and delivered any opinion as to the case; but leave the party to challenge for favor. *United States v. Johnson*, 371.
3. In manslaughter a peremptory challenge is allowed, under the Virginia law. *United States v. McLaughlin*, 444.
4. It is not a principal cause of challenge, that the juror has had conversations with some of the parties; but it is evidence for the consideration of triers upon a challenge for favor. *Young v. Marine Ins. Company*, 452.
5. If after eight jurors have been sworn, the defendant challenge one for favor, the challenge shall be tried by the jurors already sworn. *Neg. Reuben v. Bridges*, 477.
6. A juror shall not be examined on oath as to his religious opinions on the subject of slavery; nor will the court, upon a challenge for favor, suffer evidence to be given to the triers, as to the prevailing opinion of individuals of the religious sect to which the juror belongs. *Ibid.*
7. Peremptory challenge is not allowed in cases of larceny in Washington county. *United States v. McPherson*, 517.
8. The two jurors first sworn in a cause are the proper triers of a challenge for favor. *Joice v. Alexander*, 528.
9. The Court will not permit counsel to argue to the triers upon a challenge for favor. *Ibid.*
10. The challenged juror cannot be examined as a witness to the triers. *Ibid.*
11. In all cases of felony, by the laws of Virginia, the prisoner is entitled to a peremptory challenge of twenty jurors. *United States v. Browning*, 330.
12. Peremptory challenge is not allowed, in Washington, in cases of horse-stealing. *United States v. Toms*, 607.

CHANCERY.

1. It is not necessary to give notice of an application for an injunction. *Love v. Fendall*, 34.
2. An answer in chancery is not sufficiently authenticated unless the authority of the justice of the peace, before whom it was sworn, be shown. *Addison v. Duckett*, 349.
3. In a chancery attachment, if the subpoena be served on the principal, there must still be an affidavit of non-residence and an order for publication, according to the Virginia law. *Dean v. Legg et al.* 392.
4. A material amendment of a bill, after answer, must be on payment of all costs, including the solicitor's fee. *Wallace v. Taylor et al.* 393.
5. At the hearing of a cause in chancery, the court will not receive *vivâ voce* testimony, unless to prove exhibits. *Debotts v. Bacon*, 569.

CHARTER-PARTY.

A clause in a charter party, that "during obstruction of the navigation by ice the lay-days are not to be counted," applies to such obstruction as prevents the lading of the vessel as well as to such as prevents her going to sea. *Ladd v. Wilson*, 293.

CLERK.

Clerks in the public offices will not be compelled to serve as jurors, 130; *General Rule*, 147.

COMMITMENT.

1. A warrant of commitment should state probable cause supported by oath or affirmation. *Ex parte Burford*, 276.
2. Upon surrender of the debtor upon a *ca. sa.* the court will not, without motion, order him to be committed in execution. *Peter v. Suter*, 311.
3. If a person is arrested upon a bench-warrant, for treason, the court will commit him to prison without stating when or where he is to answer for the offence. *United States v. Bollman et al.* 373.
4. Upon a motion to commit for trial for treason, the party accused may be heard by counsel. *Ibid.*
5. A warrant of commitment must state probable cause supported by oath or affirmation; must be under seal; and must limit the term of imprisonment. *Ex parte Sprout & Bailey*, 424.
6. *Quere*, whether the authority to commit a seaman for deserting his ship is not limited to a justice of the peace. *Ibid.*
7. Upon an attachment of contempt the marshal cannot detain the party after the return-day of the attachment, unless by an order of commitment by the court. *Ex parte Burford*, 456.
8. A justice of the peace cannot discharge a prisoner committed for trial for felony. *United States v. Faw*, 486.

CONFESSION.

1. The jury must believe or reject the whole of the prisoner's confession; but the offer of a bribe by the prisoner to the officer to permit him to escape is evidence independent of the confession. *United States v. Barlow*, 94.
2. A confession upon oath before a magistrate cannot be given in evidence against the prisoner. *United States v. Duffy*, 164.
3. The admissions of one of several underwriters upon the same policy cannot be given in evidence against another underwriter; nor the admissions of a committee of the company, not authorized by the articles of association to make admissions. *Lambert v. Smith*, 361.
4. A confession made under the impulse of fear, or promise of favor is not evidence; but facts, discovered in consequence of such confession, are evidence. *United States v. Hunter*, 317.

CONFLICT OF LAWS.

The laws of Virginia, in the county of Alexandria, are to be considered, with respect to the laws of the United States, as common law; that is, not repealed without negative words, or other and repugnant provisions upon the same subject. *Quere. Sutton v. Mandeville*, 115.

CONSIGNEE.

When bills are drawn upon a consignee, on a shipment of tobacco, he has no right to hold up the tobacco, after the time of payment of the bills, without orders, but should sell to meet the payment of the bills. *Potts v. Finlay et al.* 514.

CONSOLIDATION.

The Court will not order actions to be consolidated. *Bank of Alexandria v. Young*, 458.

CONSTABLE.

1. A constable may be suspended from office, upon affidavit, without a rule to show cause. *Bowling's case*, 39.
2. A constable of the county of Washington, residing in Georgetown, is "a constable of the town of Georgetown and precincts," within the meaning of the by-law concerning hogs. *Holmead v. Fox*, 138.

CONSTABLE, (*Continued.*)

3. An indictment may be sustained against a constable for acting as such without having given bond. *United States v. Evans*, 149.
4. The constable is not entitled to any fee for returning an execution not served. *United States v. Little*, 411.
5. Upon a rule on a constable to show cause why he should not be removed from office "for extortion under color of his office," it is not necessary that there should be any specification of the particular facts relied upon. *Jones v. Woodrow & Neale*, 455.

CONTEMPT.

1. It is a contempt of court in a witness to refuse to answer proper questions before the grand jury, for which he may be fined and required to give security for his good behavior. *United States v. Caton*, 150.
2. Attachment of contempt for disobeying an injunction. *Munroe v. Harkness*, 157; *Munroe v. Bradley*, 158.

CONTINUANCE.

1. Attachment for non-payment of the costs of a continuance, will not be granted against a defendant against whom final judgment in the cause has been rendered. *McGill v. Sheehee*, 62.
2. If the cause has been standing five terms without issue, or rule to plead, the court will continue it at the request of the defendant. *Morgan v. Voss*, 109.
3. The court will not continue a cause for the plaintiff because he cannot find out the place of residence of his witness. *Smith v. Potts*, 123.
4. If a party has had no opportunity to cross-examine a witness whose deposition has been taken under the Act of Congress, the court will continue the cause. *Dade v. Young*, 123.
5. If, by an amendment, the nature of the action be changed, the court will continue the cause, even at the fifth term. *Schnertzel v. Purcell*, 246.
6. When there is a rule to employ new counsel, the cause may be continued after the fifth term, notwithstanding the acts of Maryland of November, 1787, ch. 9, and 1721, c. 14. *Fenwick v. Brent*, 280.
7. Counter-affidavits cannot be read on a motion for continuance of the cause. *Manning v. Jamesson et al.* 285.
8. Supplemental affidavits will not be received upon a motion for continuance of a cause. *Norwood v. Sutton*, 327.
9. The defendant is not of course entitled to a continuance, upon the death of the plaintiff. *Alexander v. Patten*, 338.
10. When depositions have been taken by one party without notice to the other, the cause may be continued. *Straas v. Marine Ins. Co.* 343.
11. If the blanks in the declaration have been filled up at the trial term, and the defendant pleads with the knowledge that they have been so filled up, it is not a ground for continuance of the cause. *Lambert v. Smith*, 347.
12. If the writ of inquiry be set aside at the trial term, the plaintiff is entitled to a continuance of the cause until the next term at the defendant's costs. *Beck v. Jones*, 347.
13. The costs of a continuance await the event of the cause, unless there is a special order to the contrary. An attachment will not lie for the non-payment of the costs of a continuance until after a rule to show cause; nor unless there has been a personal service of the order of the court to pay the costs, nor unless the bill of costs state the particular items. *Dyson v. White*, 359.
14. An affidavit is not necessary to continue a negro petition at the first term. *Negro Ben v. Scott*, 365.
15. A replication after the rule-day entitles the defendant to a continuance. *Veatch v. Harbaugh*, 402.
16. The court will not continue the cause for the defendant on the ground that his receipts are mislaid, unless the affidavit state the amounts and dates of the receipts so that the plaintiff may admit or deny them; nor unless it state circumstances by which the court can judge whether reasonable diligence has been used in searching for them. *Hyde v. Liverse*, 408.
17. If the principal comes in and gives special bail, and sets aside the plea pleaded by the appearance-bail, the plaintiff is entitled to a continuance of the cause. *Wise v. Groverman*, 418.

CONTINUANCE, (*Continued.*)

18. The court will not continue a suit at law, at the motion of the defendant on the ground that the plaintiff had not answered a bill for discovery, if the bill seek relief also. *Bennett v. Wilson*, 446.
19. The court will not, on motion of the defendant, continue a cause because the costs of a *non pros.* have not been paid. *Wheaton v. Love*, 451.
20. The court will not continue a prosecution for larceny, on the ground of the absence of a witness who could testify that he heard another man confess that he had stolen the goods. *United States v. Toms*, 607.

CONTRACT.

1. A public agent, contracting for public use, is not personally liable, although the contract be under his seal. *Hodgson v. Dexter*, 109.
2. A casualty happening against the will, and without the negligence or other default of the party, is, as to him, an inevitable casualty. *Ibid.*
3. If there be a special agreement that the plaintiff's work shall be measured and valued in a certain way, the defendant will not be permitted to show that it was not worth as much as the value thus ascertained. *Evans v. Blakeney*, 126.
4. If the measurement and valuation were reduced to writing, parol evidence of the contents of that writing cannot be given, unless the writing be lost or destroyed. *Ibid.*
5. If the plaintiff contract to do certain work, and it be done by the plaintiff and another, the plaintiff may recover for the whole in his own name. *Ibid.*
6. Under a contract to deliver rations of beef for a year, the plaintiff cannot recover for rations delivered for part of a year only, unless prevented by the plaintiff from completing the contract. *Krouse v. Deblois*, 156.
7. If there be a special contract, the plaintiff cannot recover on a general count. *Rambler v. Choat*, 167.
8. A general *indebitatus assumpsit* for goods sold and delivered, is not supported by evidence of a sale and delivery of goods under a special contract to sell and deliver certain specific goods at a certain price. *Talbot v. Selby*, 181.
9. An averment that J. L. "for a certain price," agreed to serve the plaintiff, is supported by evidence that J. L. in consideration of eight guineas paid by the plaintiff to a third person, agreed to serve the plaintiff. *Milburne v. Byrne*, 239.
10. If the plaintiff has done part of the work, contracted for by an agreement under seal, and is prevented by the plaintiff from finishing the job, he may recover the value of the work which he has done, in an action of *assumpsit*. *Preston v. Young*, 357.
11. *Indebitatus assumpsit* will lie for money due upon a special contract executed on the part of the plaintiff. *Hyde v. Liverse*, 408.
12. The plaintiff may recover upon a contract to do work in a workmanlike manner, although part of the work was not done in a workmanlike manner. *Voss v. Varden*, 410.
13. A bill of parcels receipted by the defendant, is not, *per se*, evidence of an unexecuted contract to deliver the goods; but is *prima facie* evidence of a contract executed. *Richardson v. Peyton*, 418.
14. If a person, who is not a party to a promissory note, indorses his name upon it in blank, with intent to give it credit, the plaintiff may write over it an engagement to pay it in case of the insolvency of the maker. *Offutt v. Hall*, 504.
15. The law of the place where the goods are to be delivered according to the contract, determines the merchantable quality of the goods. *Ladd v. Dulany*, 583.

CORONER.

1. The marshal is entitled to a fee of \$5.50 for summoning and impanelling a coroner's inquest in the county of Alexandria. *Brent v. Justices of Peace*, 434.
2. Neither at common law, nor by the statute of Virginia, is the coroner bound to put in writing the effect of the evidence given upon an inquisition, unless the offence be found to be murder or manslaughter. *United States v. Faw*, 456.

CORPORATION.

1. In an action upon the case against a corporation aggregate, for injury done by their agent, it is not necessary to prove that the agent had authority under the

CORPORATION, (*Continued.*)

- corporate seal, nor under an order entered upon the books of the corporation. *Hoe v. et al. v. Corporation of Alexandria*, 90.
2. *Indebitatus assumpsit* will lie against a corporation aggregate, upon an account stated by their treasurer, without examining him as a witness. *Davis v. Georgetown Bridge Co.* 147.
 3. Citizens of Alexandria are not competent jurors in an action of debt for the penalty of a by-law of the corporation; but are competent witnesses. *Common Council of Alexandria v. Brockett*, 505.
 4. The statute of usury is as applicable to corporations as to individuals. *Bank of Alexandria v. Mandeville*, 552.
 5. In an action for the use of a county, inhabitants of the county are competent witnesses for the plaintiff. *Governor of Virginia v. Evans et al.* 581.

COSTS.

1. Security for costs may be given at any time before judgment upon the rule. *Reverez v. Camellos*, 50.
2. Attachment for non-payment of the costs of a continuance will not be granted against a defendant, against whom final judgment in the cause has been rendered. *McGill v. Sheehee*, 62.
3. The statute of Gloucester, in relation to costs, is in force in Maryland, but the statute of 21 Jac. c. 16, is not. *Forrest v. Hanson*, 63.
4. Full costs are allowed upon a verdict for one cent damages in an action upon the case for damages occasioned by raising the level of the street. *Hoe v. Mayor and Com. of Alexandria*, 98.
5. Where two become bail jointly and severally, and two writs of *scire facias* are issued, and one of the bail surrenders the principal, he must pay the costs upon both writs of *scire facias*. *Pennington v. Thornton*, 101.
6. When a cause is continued at the costs of a party, no execution can issue for them; the remedy is attachment of contempt. *Fenwick v. Voss*, 106.
7. A rule on the plaintiff to give security for costs cannot be discharged by security given in the clerk's office; it must be done in open court. *Offutt v. Parrott*, 139.
8. Upon a judgment on motion upon a replevy bond for rent, the plaintiff is entitled to costs of the motion. *Cooke v. Myers*, 166.
9. The defendant may require security for costs from a plaintiff who has removed from the district since the commencement of the action. *McCutchen v. Hilleary*, 173.
10. Full costs will be given in covenant, upon one cent damages. *Woodrow v. Coleman*, 199.
11. The court will not, at a subsequent term, reinstate a cause which has been non-prossed for want of security for costs. *Lindsay v. Twining*, 206.
12. If a plaintiff has not a domicil in the district, he may be ruled to give security for costs. *Duane v. Rind*, 281.
13. An insolvent debtor will be discharged from arrest for costs accruing partly before and partly after his discharge under the insolvent act. *Tenny v. Densley et al.* 314.
14. The defendant may, at the trial court in Alexandria, give notice to a non-resident plaintiff that security for costs will be required, and the cause will be continued if the plaintiff is not ready to give the security. *Thomas v. Woodhouse*, 341.
15. If the only resident member of a firm, who are plaintiffs, dies pending the suit, the defendant may demand security for costs against the surviving plaintiffs, and the court will continue the cause to give the defendant an opportunity to lay the rule and give sixty days' notice. *Lambert v. Smith*, 347.
16. A resident of Alexandria suing in Washington must give security for costs. *Lovering v. Heard*, 349.
17. The law of Maryland respecting security for fees and costs does not apply to suits in equity. *Ray v. Law*, 349.
18. The costs of a continuance await the event of the cause, unless there is a special order to the contrary. An attachment will not lie for the non-payment of the costs of a continuance until after a rule to show cause; nor unless there has been a personal service of the order of the court to pay the costs; nor unless the bill of costs states the particular items. *Dyson v. White*, 359.

COSTS, (*Continued.*)

19. A rule having been laid for security for fees, is not, of itself, a sufficient ground to lay a rule for security for costs. *Brohawn v. Van Ness*, 366.
20. A material amendment of a bill, after answer, must be upon payment of all costs, including the solicitor's fee. *Wallace v. Taylor et al.* 393.
21. Costs on appeal from a justice of the peace are within the discretion of the court, if the judgment be affirmed in part. *Mead v. Scott*, 401.
22. When leave is given to amend on payment of costs, the payment is not a condition precedent unless so specially expressed in the order. *Butts v. Chapman*, 570; *Wigfield v. Dyer*, 403.
23. The court will not, on motion of the defendant, continue a cause because the costs of a *non pros.* have not been paid. *Wheaton v. Love*, 451.
24. The court will not permit the statute of limitations to be pleaded to an action of trespass for mesne profits, after the rule-day, but upon payment of all antecedent costs and a continuance of the cause. *Marsteller v. McClean*, 550.
25. The fees of a magistrate in another state for taking a deposition under the Act of Congress may be taxed in the bill of costs in Virginia. *Fry v. Yeaton*, 550.
26. If the plaintiffs dismiss their bill because they are not competent to sue as executors in the District of Columbia, a lawyer's fee may be taxed against them. *Patterson's Executors v. Ball*, 571.
27. The prosecutor must give security for costs, in Alexandria. *United States v. Dulany*, 571.
28. If a witness be surety for costs the court will permit other security to be substituted, so as to remove the interest of the witness. *Governor of Virginia v. Evans et al.* 581.

COUNTERFEIT MONEY.

The delivery of counterfeit money to a person to be passed off generally, for the benefit of the prisoner, is not a passing "in payment" within the Virginia Act of 19 December, 1792. *United States v. Venable*, 416.

COURT.

A special session for the trial of criminal causes may be ordered at an adjourned session of the court, and may be holden at the same time with the adjourned session. 114.

COVENANT.

1. To an action of covenant for rent the defendant cannot plead that his lessor had not paid the ground-rent according to his covenant. *Gill v. Patton*, 143.
2. In an action of covenant for rent the landlord cannot recover interest. *Id.* 188.
3. Full costs will be given in covenant, upon one cent damages. *Woodrow v. Coleman*, 199.
4. Covenant will not lie on the condition of an injunction-bond. *Summers v. Watson*, 254.

DAMAGES.

1. In slander, one cent damages carries full costs. *Forrest v. Hanson*, 63.
2. Malice may be given in evidence in aggravation of damages in an action on a bond conditioned to prove the plaintiff a bankrupt. *Sutton v. Mandeville*, 187.
3. Full costs will be given in covenant, upon one cent damages. *Woodrow v. Coleman*, 199.
4. The value of the article on the day the cause of action accrued is the true measure of damages for not delivering it according to contract. *McAllister v. Douglas*, 241.
5. Upon executing a writ of inquiry upon a judgment by default, the jury must find at least one mill in damages. *Frazier v. Lomax*, 328.

DEATH.

1. In case of the death of a plaintiff, the filing of letters of administration is such a proceeding in the case before 10th day of the second court as will justify the court in retaining cognizance of the cause under the act of Maryland, 1785, c. 80, § 1. *Wilson v. Harbaugh*, 315.
2. The defendant is not of course entitled to a continuance, upon the death of the plaintiff. *Alexander v. Patten*, 338.

DEBT.

1. In Virginia debt lies by the indorsee of an inland bill against the acceptor. *Vowell v. Alexander*, 33.
2. Debt lies against the maker of a promissory note. *Gardner v. Lindo*, 78.
3. In debt, the declaration must be for a sum certain. *Ashton v. Fitzhugh*, 218.
4. In Alexandria the court has jurisdiction of an action of debt on a note for two hundred and fourteen dollars, although the sum due upon it is reduced by payments, to eight dollars and ninety-four cents. *Hays v. Bell & Wray*, 440.
5. An action of debt under the Virginia law, may be maintained upon a promissory note, against a secret partner who has not signed it. *Bank of Alexandria v. Mandeville*, 575.

DEDIMUS.

1. Notice, given to an attorney at law, of a motion for a *dedimus*, is sufficient. *Potts v. Skinner*, 57.
2. The court in Alexandria will not grant a commission to examine witnesses in a suit at common law without affidavit showing it to be necessary for the purposes of justice. *Sutton v. Mandeville*, 115.

DEED.

1. The execution of a deed need not be proved if it be acknowledged and recorded. *Edmondson v. Lovell*, 103.
2. It is not necessary to the delivery of a deed as an *escrow* that the obligee should be privy to its delivery, nor that the thing to be performed, as a condition of the delivery, should be a thing to be done by the obligee. *Mayor & Com. of Alexandria v. Moore*, 193.
3. A subscribing witness to a deed may be compelled to attend court to prove the execution so that it may be recorded. *Irwin v. Dunlop*, 552.
4. The adding a new surety, without the consent of the others, makes the bond void. *Long v. O'Neale*, 233.

DEMURRER.

1. A special demurrer will not be admitted to set aside an office judgment. *Whetcroft v. Dunlop*, 5.
2. The plaintiff is not obliged to join in demurrer to the evidence, unless the demurrer expressly admits every fact which the jury might reasonably infer from the testimony; but if the demurrer be joined, the court will infer what the jury might infer. *Negro Patty v. Edelin*, 60.
3. The defendant will not be ruled to argue a demurrer at the term at which the demurrer shall have been joined by him, although the rule to join in demurrer shall have expired before the term. *Bowman v. French*, 74.
4. A demurrer, which admits a fact in one cause, is not evidence of that fact in another cause, although between the same parties. *Auld v. Hepburn*, 122, 166.
5. After judgment for the plaintiff on the defendant's demurrer, and writ of inquiry awarded, the court will not permit the defendant to plead *de novo* without withdrawing his demurrer. *Woodrow v. Coleman*, 192.
6. The court will not give leave to amend a demurrer unless it goes to the merits. *Offutt v. Beatty*, 213.
7. It is no ground of general demurrer to an indictment for misdemeanor, under the laws of Virginia of 1792 and 1795, that the name of a prosecutor is not written at the foot of the indictment. *United States v. Sandford*, 323.
8. A special demurrer brings into question the substantial validity of the pleading of the demurring party. *Vowell v. Lyles*, 428.
9. The court will permit the defendant to withdraw the general issue, and file a general demurrer. *Deakins v. Lee*, 442.
10. After judgment for the plaintiff upon demurrer to the replication to the plea of limitations, the court will not permit the defendant to withdraw the demurrer and rejoin specially, unless he can show by affidavits, that it is necessary to the justice of the case. *Wilson v. Mandeville et al.* 452.

DEPOSITION.

1. A deposition taken under a commission may be read in evidence unless the opposite party can prove that the witness is within reach of the process of the court. *Ridgeaway v. Ghequier*, 4.

DEPOSITION, (*Continued.*)

2. One hour's notice, to the attorney-at-law of the opposite party, of the time and place of taking a deposition, when the party lives in the same village or town, is reasonable notice, unless special circumstances should render it unreasonable. *Leiper v. Bickley*, 29; *Nicholls v. White*, 58.
3. A deposition taken by *dedimus*, may be in the handwriting of the counsel of the party. *Ibid.*
4. If a party has had no opportunity to cross-examine a witness whose deposition has been taken under the Act of Congress, the Court will continue the cause. *Dade v. Young*, 123.
5. One day's notice to the attorney-at-law is sufficient to take the deposition of a sea-faring man under the Maryland law, 1721, c. 14, § 3, but it cannot be read unless the witness has gone from the district. *Bowie v. Talbot*, 247.
6. It is not necessary that the notice of taking a deposition under the Act of Congress, should state the reason for taking it. *Debatts v. McCulloch*, 286.
7. To enable a party to read in evidence a deposition, taken *de bene esse* under the Act of Virginia, he must prove that the witness is unable to attend. *Jones v. Greenolds*, 339.
8. When depositions have been taken by one party without notice to the other, the cause may be continued. *Straus v. Marine Ins. Co.* 343.
9. A deposition *de bene esse* cannot be read in evidence if the witness lives within one hundred miles of the place of trial, although he lives out of the district. *Park v. Willis*, 357.
10. A deposition taken and filed by the defendant, may be read in evidence by the plaintiff, upon proof that the witness is beyond the jurisdiction of the court. *Ibid.*
11. Under the Virginia law respecting the taking of depositions, notice to the attorney-at-law is not sufficient. *Wheaton v. Love*, 429.
12. The party will not be permitted to give parol evidence of a cause of caption of a deposition, different from the cause stated by the magistrate who took the deposition; and if that cause be insufficient, the deposition will be rejected. *Id.* 451.
13. This court will not grant a commission, in a civil action at common law, to take the deposition of a witness residing in Virginia, within one hundred miles of the place of trial; because he may be summoned to attend personally. *Wellford v. Miller*, 485.
14. A deposition, taken but not used by the plaintiff, cannot be read in evidence by the defendant, if the testimony would not have been competent for the defendant if it had been taken on his part. *Reid v. Hodgson*, 491.
15. A judge who takes a deposition under the Act of Congress, must certify that the witness was cautioned and sworn to testify the whole truth; and that notice was given to the adverse party, or the reason why it was not given. *Pentleton v. Forbes*, 507.
16. The magistrate who takes a deposition under the Act of Congress, must certify all the facts necessary to make it evidence under the Act. *Jones v. Knowles*, 523.
17. It is a sufficient averment of the residence of the adverse party, by a magistrate who takes a deposition under the Act of Congress, if he certifies that it appears to him that the party resides more than one hundred miles from the place of caption. *Banks v. Miller*, 543.
18. If the defendant take and return the deposition of an interested witness, he cannot object to its being read because the witness was interested. *Quære. Henry v. Ricketts et al.* 545.
19. The fees of a magistrate, in another state, for taking a deposition under the Act of Congress, may be taxed in the bill of costs, in Virginia. *Fry v. Yeaton*, 550.
20. Two hours' notice of taking a deposition in Alexandria, where all the parties resided, was too short. *Jamieson v. Willis*, 566.
21. Notice of a motion for a *dedimus*, to take depositions in a foreign country, may be given to the attorney-at-law. *Irving v. Sutton*, 575.
22. The court will not, in a civil suit, attach a witness who resides more than one hundred miles from the place of trial; nor issue a subpoena commanding him to go and testify before a magistrate. *Henry v. Ricketts et al.* 580.

DEPOSITION, (*Continued.*)

23. A deposition taken without notice, and not upon interrogatories, under a commission issued by consent, cannot be read in evidence. *Dunlop v. Munroe*, 536.

DEPRECIATION.

Upon a deed made in 1779 reserving an annual rent of 26*l.* current money of Virginia forever, the rents accruing during the existence of paper money, are to be reduced according to the scale of depreciation. *Marsteller v. Faw*, 117.

DEVISE.

1. A devise that a slave should be sold for eight years, after which he should be free; the term of eight years shall begin to run from the death of the testator, or within a reasonable time thereafter. *Negro Basil v. Kennedy*, 199.
2. A devise of land after payment of debts, subjects the land to the payment of the debts. *Wright v. West's Ex's*, 303.
3. The words "I will, in the first place, that my just debts be paid" charge the real estate with the payment of the debts. *McCulloch v. McLain's Ex's*, 304.

DISORDERLY HOUSE.

1. The time laid in an indictment for keeping a disorderly house is not material. *United States v. Burch*, 36.
2. A conviction of keeping a disorderly house is a bar for all the time previous to the conviction. *Ibid.*
3. The selling of spirituous liquors to negroes in a public manner, assembled in considerable numbers, and suffering them to drink the same in and about the house, on the Sabbath, constitutes it a disorderly house. *United States v. Prout*, 203; *United States v. Coulter*, 203; *United States v. Lindsay*, 245.

DISTRESS.

1. Goods in the hands of an officer under a distress for rent, in Virginia, may be attached by the same landlord, for rent not yet due, and may be condemned, although replevied by the tenant after the attachment levied. *Herbert v. Ward*, 30.
2. An acceptance, by the tenant, of a bill drawn on him, by the landlord, for the rent, is not a bar to a distress, if the bill be not paid. *Alexander v. Turner*, 86.
3. Upon the plea of "no rent arrear" the tenant may give evidence of work done, and goods sold and delivered to the landlord, without notice of set-off. *Fendall v. Billy*, 87.
4. The landlord may distrain after the death of the lessee. *McLaughlin v. Riggs*, 410.
5. Upon the issue of no rent arrear, the landlord is not bound to prove that the distress was laid by his order. *Ibid.*
6. Goods distrained for rent may be sold by the tenant, and the vendee may maintain trover for them after they have been replevied. *Cooke v. Woodrow*, 437.
7. Property, distrained for rent, may be transferred by the tenant to the creditors, subject to the lien for the rent. *Cooke v. Neale*, 493.

DISTRICT OF COLUMBIA.

The jurisdiction of the United States over the District of Columbia vested on the first Monday of December, 1800. *United States v. Hammond*, 15.

DIVORCE.

A decree for a divorce *a vinculo*, and declaring that the articles entered into previously, for alimony, should remain in force, is no bar to an action upon a bond given to perform those articles. *McGowan v. Caldwell*, 481.

DUTIES.

1. In action upon duty bonds the United States are entitled to judgment at the return term. *United States v. Johns*, 284.
2. Sureties, of an insolvent debtor, in a duty bond, are not entitled to judgment at the first term, against their principal. *Johns v. Brodhag*, 235.
3. A surety who has paid money for a bankrupt in discharge of a duty bond, has not the right of the United States to proceed against the person of the bankrupt; but only against his effects. *Kerr v. Hamilton*, 546.

EJECTMENT.

1. In ejectment upon a reëntry for non-payment of rent, the plaintiff need not show a title in fee, if he has been in possession forty-four years; nor that there were not sufficient goods on the premises within the first thirty days; nor that he demanded the rent on the day it became due; nor on what part of a vacant city lot the rent was demanded. *Cooke's Lessee v. Voss*, 25.
2. In ejectment for a lot in Washington, it is not necessary to show a grant from the State of Maryland. *O'Neal's Lessee v. Brown*, 69.
3. The legal title in the trustees cannot be set up against the *cestui que trust*. *Ibid*.
4. By the Acts of Maryland, 1791, c. 45, § 2, and 1793, c. 58, the legal title vests in the *cestui que use*. *Ibid*.
5. The commissioners were authorized to sell the public lots in Washington, in April, 1797. *Ibid*.
6. In ejectment the plats are a part of the pleadings; in trespass they are only evidence. *Pancoast v. Barry*, 176.
7. A person interested in supporting a particular location is not a competent witness to prove it. *Ibid*.
8. All locations not counter located are admitted to be correct. *Ibid*.
9. Course and distance must yield to boundaries proved. *Ibid*.
10. Permanent and useful improvements, made upon the land, may be given in evidence in mitigation of damages, in an action of trespass for *mesne* profits, brought after recovery in ejectment. *Gill v. Patten*, 465.

EQUITY.

1. A court of equity will not interfere to prevent an administrator from preferring a creditor by confessing a judgment at law. *Wilson v. Wilson*, 255.
2. By the laws of Virginia in 1801, a court of equity could decree a sale of one moiety of the fee-simple of the debtor's lands in the hands of his heir at law. *Prime v. McRea*, 294.
3. Cause may be shown against a decree *nisi*, at any time during the term and before any other order is made. *Allen v. Thomas*, 294.
4. A court of equity will not decree the execution of a verbal agreement to pay the debt of another, although confessed in the answer, if the statute of frauds be pleaded, and insisted upon in the answer. *Thompson et al. v. Jamesson*, 295.
5. A deposition taken more than six months after replication, in a chancery suit, cannot be read at the hearing, unless taken by consent, or by order of the court, or out of the district. *Wiggins v. Wiggins*, 299.
6. The absence of a witness, at the trial at law, is no ground of equity to obtain an injunction to stay proceedings at law on a judgment. *Chapman & Wise v. Scott*, 302.
7. Equity will not relieve against a judgment at law upon *plene administravit*, on the ground that the defendant at law could not produce vouchers to support his plea; unless there be in the bill, an allegation of fraud, mistake, surprise, or accident. *Wilson's Executors v. Bastable*, 304, 394.
8. The law of Maryland respecting security for fees and costs, does not apply to suits in equity. *Ray v. Law*, 349.
9. Equity will compel the defendant to give up an inventory necessary to enable the plaintiff to support his action at law. *Walker et al. v. Wanton et al.* 397.
10. The court will not enjoin what may, or may not, be a nuisance. *Ramsay v. Riddle et al.* 399.
11. The proceeds of sales of land made, under a will, to pay debts, are equitable assets. *Dixon v. Ramsay*, 496.

ERROR.

1. A writ of error is not a *supersedeas* unless served within ten days after the rendition of the judgment, although the parties should have agreed to stay execution for two months, and the writ of error should be served before the expiration of that time. *Thompson v. Voss*, 108.
2. After a writ of error has been served and returned to the supreme court, the record is no longer before the court below; and cannot be amended, although at an adjourned session of the same term it appear that the writ of error has been dismissed in the court above, at the request of the party praying an amendment. *United States v. Hooe*, 116.
3. A writ of error is not a *supersedeas* unless a copy of the writ be filed in the

ERROR, (Continued.)

clerk's office for the adverse party, according to the 23d section of the Judiciary Act of 1789. *Moore v. Dunlop*, 180.

4. If the writ of error be not a *supersedeas*, the court below may proceed to execution. *Grundy v. Young*, 443.
5. The refusal of a new trial is not error. *Henry v. Ricketts et al.* 545.
6. A writ of error is not a *supersedeas* unless a copy of it be lodged, for the adverse party, in the clerk's office within ten days after the judgment. *Ex parte Negro Ben*, 532.

ESCAPE.

The marshal is liable if he suffers a debtor in execution to escape, although the debtor returns into custody, and the marshal has him at the return of the *ca. sa.* *United States v. Brent*, 525.

ESCROW.

It is not necessary to the delivery of a deed as an *escrow*, that the obligee should be privy to its delivery, nor that the thing to be performed, as the condition of the delivery, should be a thing to be done by the obligee. *Mayor & Commonalty of Alexandria v. Moore*, 193.

ESTOPPEL.

The master of an apprentice is concluded by the recital of the indentures as to the age of the boy. *McCutchin v. Jamieson*, 348.

EVIDENCE.

1. Parol evidence cannot be given of a statement of an account by a master in chancery in a suit pending in another court. *Sutton v. Mandeville*, 2.
2. Diligent inquiry for a subscribing witness will not dispense with his testimony, if it appear that he is within the country. *Broadwell v. McClish*, 4.
3. Upon a writ of inquiry, in Virginia, the plaintiff's own oath may be received as evidence of the amount of the claim. *Mandeville v. Washington*, 4.
4. A deposition taken under a commission may be read in evidence unless the opposite party can prove that the witness is within reach of the process of the court. *Ridgeway v. Ghequier*, 4.
5. Although the contract offered in evidence vary from that stated in the special count, yet the receipt for the purchase-money, at the bottom of the contract, is evidence on the money counts. *Anderson v. Alexander*, 6.
6. Upon indictment for larceny under the Act of Congress, the owner of the stolen goods is a competent witness for the United States, after having released to them his half of the fine. *United States v. Clancey*, 13.
7. The certificate of the presiding magistrate is not necessary to an exemplification of the records of Virginia and Maryland, for the purpose of obtaining execution under the Act of 27th February, 1801, § 13. *Parrott v. Habersham*, 14.
8. Comparison of handwriting is admissible evidence in civil causes. *Dunlop v. Silver*, 27.
9. One hour's notice to the attorney-at-law of the opposite party, of the time and place of taking a deposition, when the party lives in the same village or town, is reasonable notice, unless special circumstances should render it unreasonable. *Leiper v. Bickley*, 29.
10. A certificate of an oath taken by a slave-owner may be given in evidence, although it vary from the oath required by law. *Negro Rose v. Kennedy*, 29.
11. In trover, a demand and refusal are not always evidence of conversion. *McIntosh v. Summers*, 41.
12. The indorsement of the name of a witness, by the grand jury, on the presentment, is *prima facie* evidence that it was made upon his testimony. *Commonwealth v. Gordon*, 48.
13. The United States cannot give evidence of the general bad character of the prisoner unless he should first bring evidence to support his character. *United States v. Carrigo*, 49.
14. One hour's notice of taking a deposition, in Alexandria, is sufficient. *Nicholls v. White*, 58.
15. A deposition taken by *dedimus* may be in the handwriting of the opposite party. *Ibid.*
16. The affidavit of the party is sufficient to prove the loss of papers. *Ibid.*

EVIDENCE, (*Continued.*)

17. The plaintiff is not obliged to join in demurrer to evidence unless the demurrer expressly admits every fact which the jury might reasonably infer from the testimony; but if demurrer be joined the Court will infer what the jury might infer. *Negro Patty v. Edelin*, 60.
18. On a trial for murder, the dying declarations of the deceased, are evidence. *United States v. McGurk*, 71.
19. Extorted confession is not evidence against the prisoner. *United States v. Pumphreys*, 74.
20. In an action against the indorser of a foreign bill of exchange for non-payment, it is not necessary to produce a protest for non-acceptance. *Hodgson v. Turner*, 74.
21. In an action of slander, if it appear, from the plaintiff's evidence, that at the time of speaking the words the defendant named his author, who was a responsible man, the defendant may avail himself of that evidence without pleading the matter as a special justification. *Hogan v. Brown*, 75.
22. A witness who cannot testify in a cause without criminating himself, shall not be sworn. *Neale v. Coningham*, 76.
23. An entry in the defendant's books, not signed by any one, is not a sufficient note in writing to take the case out of the Statute of Frauds. *Barry v. Law*, 77.
24. The record of a court in Virginia, must be certified by the presiding magistrate. *Gardner v. Lindo*, 78.
25. The act of limitations cannot be given in evidence upon *nil debet*. *Ibid*.
26. A certificate in fee, from the commissioners of the city of Washington, is not evidence of possession. *O'Neale v. Brown*, 79.
27. Upon a trial for larceny, the owner of the stolen goods is a competent witness in chief, upon filing with the clerk of the court, for the use of the prisoner, a release of the witness's right to one half of the fine which the Court might impose. *United States v. Hare*, 82.
28. A *subpoena duces tecum* will not be ordered to a clerk of a court in Virginia to bring here original papers filed in his court. *Craig v. Richards*, 84.
29. The obligee's indorsement of a payment upon a bond is not evidence to rebut the presumption of payment, unless made with the privity of the obligor. *Kirkpatrick v. Langphier*, 85.
30. The party's own books of account are not evidence in his favor, although in the handwriting of a deceased clerk, unless they contain the first entry of the charges. *Fendall v. Billy*, 87.
31. A record of a former judgment between the same parties, upon the same cause of action, may be given in evidence upon *non assumpsit*. *Ridgway v. Ghequier*, 87.
32. An instrument can be proved only by the subscribing witness, unless, &c. *Rhodes v. Rigg*, 87.
33. Upon application for naturalization, a deposition in 1802, that the deponents have known the applicant, "since the year 1793, in New York," is not evidence that he was residing in the United States, before the 29th of January, 1795. *Ex parte Tucker*, 89.
34. When the terms of submission to arbitration are uncertain, parol evidence may be given of the controversies submitted. *Davy v. Faw*, 89.
35. The plaintiff, suing as assignee of a bankrupt, must produce the commission and proceedings and deed of assignment. *McIver v. Moore*, 90.
36. A slave cannot be a witness if a free white man be a party. *Thomas v. Jamesson*, 91.
37. A slave may be a witness against a free mulatto in Alexandria county. *United States v. Betty Bell*, 94.
38. On a trial for larceny of the goods of T. L. evidence that they were the property of a deceased person, in the possession and under the management of T. L. will support the indictment. *United States v. Barlow*, 94.
39. The jury must believe or reject the whole of the prisoner's confession; but the offer of a bribe is evidence independent of the confession. *Ibid*.
40. Comparison of handwriting is evidence to prove the publication of a libel. *Brooke v. Peyton*, 96.
41. Possession of the goods, by a witness, under one of the parties is not such an in-

EVIDENCE, (*Continued.*)

- terest as will exclude him as a witness in favor of that party. *Hamilton v. Russell*, 97.
42. Evidence of the defendant's confession will not dispense with the testimony of the subscribing witness. *Smith v. Carolin*, 99.
 43. The declarations of a witness not under oath, may be given in evidence to discredit his testimony. *Harper v. Reily*, 100.
 44. Upon indictment for retailing spirituous liquors, the informer is not entitled to half of the penalty, and is a competent witness. *United States v. Voss*, 101.
 45. The execution of a deed need not be proved by the witnesses, if it be acknowledged and recorded. *Edmondson v. Lovell*, 103.
 46. In assumpsit for goods sold, the defendant may prove a partnership between the plaintiff and the witness, by the witness. *Lovejoy v. Wilson*, 102.
 47. On a count "for sundry matters properly chargeable in account," the plaintiff may give evidence of money lent, although no account was filed with or annexed to the declaration. *Ibid.*
 48. Upon an indictment for stealing a check upon a bank it is not necessary to produce the check itself, in order to admit parol evidence that it was presented at the bank. *United States v. Wilson*, 104.
 49. The informer is not entitled to half of the penalty upon a minister, for marrying a woman under sixteen years of age, without the consent of her parents, and is therefore a competent witness. *United States v. McCormick*, 106.
 50. The Court, in Alexandria, will not grant a commission to examine witnesses, in a suit at common law, without affidavit showing it to be necessary for the purposes of justice. *Sutton v. Mandeville*, 115.
 51. On an indictment for murder, the declarations of the deceased, *in extremis*, and when sensible of approaching death, may be given in evidence as to facts, but not as to opinions. *United States v. Veitch*, 115.
 52. Parol evidence will not be received to explain a written agreement, until it is first shown that the expressions are equivocal. *Auld v. Hepburn*, 122.
 53. A demurrer which admits a fact in one cause, is not evidence of that fact in another cause, although between the same parties. *Ibid.*
 54. In assault and battery, on the plea of not guilty, the plaintiff is not bound to prove that the defendant struck or assaulted him first. But on the plea of *son assault demesne*, the defendant must prove that the plaintiff assaulted him first. *Stevens v. Lloyd*, 124.
 55. If there be a special agreement that the plaintiff's work shall be measured and valued in a certain manner, the defendant will not be permitted to show that it was not worth as much as the value thus ascertained. *Evans v. Blakeney*, 126.
 56. If the measurement and valuation were reduced to writing, parol evidence of the contents of that writing cannot be given, unless the writing be lost or destroyed. *Ibid.*
 57. The plaintiff's own oath is not evidence in any case unless made within one year from the date of the articles charged. *Farrell v. Knapp*, 131.
 58. Upon a general *indebitatus assumpsit* for \$200 for work and labor, there must be evidence of an express promise to pay a sum certain. *Ibid.*
 59. A special agreement to do the work at certain prices cannot be given in evidence upon general *indebitatus assumpsit*. *Ibid.*
 60. The handwriting of a party cannot be proved by comparison with the handwriting of his power of attorney filed in the cause, there being no proof of the latter. *Shannon v. Fox*, 133.
 61. The Court will not continue a cause because a commission to examine a witness has not been returned, unless the materiality of the testimony of the witness be shown by affidavit. *Morgan v. Voss*, 134.
 62. In an action against A. who was surety for money advanced to B. the acknowledgments of B. as to receipts of money, may be given in evidence to charge A. *Ingle v. Collard*, 134.
 63. In order to make the plaintiff's own affidavit evidence in support of an account where the dealings do not exceed £10 in one year, that affidavit must state that no security has been given for the debt, and must pursue exactly the form prescribed in the Act of Assembly of Maryland. *Rogers v. Fenwick*, 136.
 64. If a landlord take the single bill of a third person for the amount of rent due from his tenant, and give time of payment to the third person until he fails, this is good evidence to support the plea of "no rent arrear." *Josse v. Shultz*, 135.

EVIDENCE, (*Continued.*)

65. Leading questions may be asked in cross-examination. *Dawes v. Corcoran*, 137.
66. The plaintiff cannot recover upon a general *indebitatus assumpsit* if a special agreement be proved. *Krouse v. Deblois*, 138.
67. An unlawful act is evidence of an unlawful intent. *United States v. McFarland et al.* 140.
68. In debt against the sureties in a sheriff's bond, his return that he had satisfied the plaintiff, is not evidence for the defendants. *Governor of Virginia v. Wise et al.* 142.
69. If the plaintiff produce the return as evidence of the receipt of the money by the sheriff, it is also evidence that he paid it to the plaintiff; it being so stated in the return. *Ibid.*
70. An account stated by the treasurer of an aggregate corporation is evidence to charge the corporation. *Davis v. Georgetown Bridge Co.* 147.
71. A slave is not a competent witness in favor of a free mulatto upon a public prosecution. *United States v. Nancy Swann*, 148.
72. An attorney at law cannot be compelled to disclose any fact, the knowledge of which has been communicated to him by his client. *Murray v. Dowling*, 151.
73. A confession upon oath before a magistrate cannot be given in evidence against the prisoner. *United States v. Duffy*, 164.
74. Possession is *prima facie* evidence of property. *Ibid.*
75. Words accompanying actions may be given in evidence to show the intent. *United States v. Omeara*, 165.
76. The defendant's witnesses, who were engaged in the riot, will not be permitted to give evidence of their intention in meeting. *United States v. Dunn et al.* 165.
77. An admission of facts, by a demurrer, in one suit, is not evidence of the same facts in another suit between the same parties. *Auld v. Hepburn et al.* 166.
78. In an action at law by a seaman against the master, the plaintiff may read in evidence the answer of the master to a libel by the seamen for wages, the plaintiff being one of the libellants. *Rambler v. Choat*, 167.
79. After the term in which a rule is laid on the plaintiff to give security for fees, the clerk, upon a motion for judgment on the rule, need not prove the plaintiff to be a non-resident. *Devigny v. Moore*, 174.
80. In ejectment the plats are part of the pleadings; in trespass they are evidence only. *Pancoast v. Barry*, 176.
81. A person interested in supporting a particular location is not a competent witness to prove it. *Ibid.*
82. All locations, not counter-located, are admitted to be correct. *Ibid.*
83. Course and distance must yield to boundaries proved. *Ibid.*
84. A witness may be allowed his fees, although not regularly summoned. *United States v. Williams & Ray*, 178.
85. Bankruptcy of the plaintiff cannot be proved by parol. *Moore v. Voss*, 179.
86. If the original entries are lost, copies may be given in evidence. *Ibid.*
87. A general *indebitatus assumpsit*, for goods sold and delivered, is not supported by evidence of a sale and delivery of goods under a special contract to sell and deliver certain specific goods at a certain price. *Talbot v. Selby*, 181.
88. The testimony of a subscribing witness may be dispensed with if he is absent from the country. *Jones v. Lovell*, 183.
89. Comparison of handwriting is not evidence. *McCubbin v. Lovell*, 184.
90. If the jury, after retiring, come into court to ask questions of a witness, the counsel will not be permitted to interrogate the witness. *United States v. Greenwood*, 186.
91. Malice may be given in evidence, in aggravation of damages in an action upon a bond conditioned to prove the plaintiff a bankrupt. *Sutton v. Mandeville*, 187.
92. Evidence cannot be given to show that the commissioners of bankruptcy erred in their judgment. *Ibid.*
93. The Act of Congress respecting the authentication of records of State courts, does not apply to the records of the courts of the United States. *Mason v. Lawrason*, 190.
94. A copy of the proceedings of commissioners of bankrupts in England, is not evidence under the act of Virginia, because not recorded in England so as to make it evidence there. *Leay et al. v. Wilson*, 191.
95. If the agent of the drawee of a bill write an order on the back of it to another

EVIDENCE, (*Continued.*)

- person to pay it, this order is evidence of the drawee's acceptance of the original bill. *Harper v. West*, 192.
96. Counsel may testify to facts not confidentially communicated to them by their clients. *Bank of Columbia v. French*, 221.
97. The maker of a note is a competent witness for the indorser. *Ibid.*
98. When the jury are to assess the fine, evidence may be given to them in mitigation. *United States v. Bartle*, 236.
99. In an action for enticing a servant, the declarations of the servant cannot be given in evidence. *Milburne v. Byrne*, 239.
100. One day's notice to an attorney at law, is sufficient to take the deposition of a seafaring man under the Maryland law of 1721, c. 14, § 3, but it cannot be read unless the witness has gone from the district. *Bowie v. Talbot*, 247.
101. Although there be an agreement that the value of extra work should be ascertained by persons mutually chosen, yet, if such valuation has not been actually made, the plaintiff, in an action upon a *quantum meruit*, may give other evidence of the value of the work. *Baker v. Herty*, 249.
102. The opinion of a witness (who has seen the party sign a paper) that another paper is also in the handwriting of the same party, is competent evidence, although his opinion, is the result of comparison. *Hopkins v. Simmons*, 250.
103. In assault and battery for beating the plaintiff's servant, *per quod*, &c., the plaintiff cannot recover without evidence of loss of service. *Voss v. Howard*, 251.
104. A joint bill of parcels is not conclusive evidence of a joint sale. *Johnston v. Harris*, 257.
105. Upon a plea of tender the plaintiff must prove that he produced and offered the money to the plaintiff. *Ladd v. Patten*, 263.
106. If the subscribing witness to a note be not within reach of the process of the Court, it is not necessary to produce him, or to prove his handwriting; but the defendant's handwriting may be proved. *Wellford v. Eakin*, 264.
107. An officer cannot justify under a *fiery facias* without producing it. *United States v. Baker*, 268.
108. The authority of an agent may be proved by the testimony of the agent himself. *Ibid.*
109. The owner of stolen goods is a competent witness after releasing to the United States his share of any fine which the Court may impose upon the prisoner. *United States v. Frank Tolson*, 269.
110. A stockholder in the bank is a competent witness for the prosecution on an indictment for receiving a stolen bank-note, the property of the bank, the witness having released to the United States all his interest in the fine. *United States v. Morgan*, 278.
111. Delivery of the cargo to the owners, by the supercargo, is evidence of his receipt of his commissions, in an action against him by a third person who is entitled to a share of the commissions. *Manning v. Lowdermilk*, 282.
112. Upon the issue of infancy, in an action upon a promissory note, the plaintiff is not bound to produce the note at the trial. *Davidson v. Henop*, 280.
113. It is not necessary that the notice of taking a deposition under the Act of Congress should state the reason for taking it. *Debotts v. McCulloch*, 286.
114. Words spoken of one of the plaintiffs, cannot be given in evidence to support an averment of words spoken of both plaintiffs; nor can words spoken by each defendant separately, and out of the presence of each other, be given in evidence to support an averment of words spoken jointly by the defendants. *Davis and Wife v. Sherron and Wife*, 287.
115. A sentence of a foreign court of Vice-Admiralty, condemning a vessel as enemy's property, is not conclusive evidence of violation of neutrality. *Croudson v. Leonard*, 291.
116. Parol evidence cannot be given to vary or explain an unambiguous written agreement. *Ladd v. Wilson*, 293.
117. A deposition taken more than six months after replication, in a chancery suit, cannot be read at the hearing, unless taken by consent, or by order of the Court, or out of the district. *Wiggins v. Wiggins*, 299.
118. Parol evidence may be given of the contents of a lost warrant. *United States v. Lambell*, 312.
119. Parol evidence cannot be admitted to prove the contents of a warrant, unless the

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- loss of the warrant be proved. *United States v. Wary*, 312. *United States v. Long*, 373.
120. In an action for goods sold by Tibbs & Company, the plaintiffs must prove themselves to be the firm of Tibbs & Company. *Tibbs et al. v. Parrott*, 313.
121. The wife of him whose goods were stolen is not a competent witness for the prosecution, unless the husband has released to the United States his share of the fine. *United States v. Shorter*, 315.
122. A confession, made under the impulse of fear or the promise of favor, is not evidence; but facts discovered in consequence of such confession are evidence. *United States v. Hunter*, 317.
123. Satisfaction to the owner of the goods stolen is admissible; but if made merely to avoid the inconvenience of imprisonment or of a trial, and not under a consciousness of guilt, it is not evidence against the prisoner. *Ibid.*
124. Slaves are competent witnesses for free negroes indicted for assault and battery. *United States v. Negro Terry*, 318.
125. A mere honorary obligation to indemnify a prosecutor who is liable for costs, is not a sufficient interest to exclude the testimony of the witness. *United States v. Lyles*, 322.
126. The receipt of a bond of a third person, "in part pay" of a precedent debt, is conclusive evidence of payment to that extent, although the obligor was insolvent when the receipt was given. *Muir v. Geiger*, 323.
127. The Court has power to send an attachment into Virginia for a witness, in a civil cause, who lives within one hundred miles of the place of trial. *Voss v. Lulce*, 331.
128. To enable a party to read in evidence a deposition taken *de bene esse*, under the Act of Virginia, he must prove that the witness is unable to attend. *Jones v. Greenolds*, 339.
129. Outstanding judgments cannot be given in evidence upon *plene administravit*, but must be specially pleaded. *Hines v. Craig*, 340.
130. If there be judgment for one of several defendants, upon demurrer to his separate plea of bankruptcy, he may be examined as a witness for the other defendants upon executing a release of his interest in his estate. *Hurliki v. Bacon*, 340.
131. Infancy cannot be given in evidence upon *nil debet*. *Young v. Bell et al.* 342.
132. The Court will not compel a witness to testify against his interest, in a cause in which he is interested. *Carne et al. v. McLane*, 351.
133. A deposition *de bene esse* cannot be read in evidence, if the witness lives within one hundred miles of the place of trial, although he lives out of the district. *Park v. Willis*, 357.
134. A deposition taken and filed by the defendant, may be read in evidence by the plaintiff, upon proof that the witness is beyond the jurisdiction of the Court. *Ibid.*
135. The admissions of one of several underwriters upon the same policy cannot be given in evidence against another underwriter; nor the admissions of a committee of the company, not authorized by the articles of association, to make admissions. *Lambert v. Smith*, 361.
136. The plaintiff cannot give evidence that other underwriters on the same policy have paid upon the same risk. *Ibid.*
137. The Court will not receive parol evidence of the agreement of counsel respecting the admission of papers in evidence. *Ibid.*
138. The sentence and proceedings of a foreign court of Vice-Admiralty, condemning the goods as enemy-property, are not conclusive evidence of that fact, in a suit upon a policy of insurance. The sentence may be invalidated by the evidence contained in the record of the proceedings. *Ibid.*
139. In an action upon the case against the owner of a stage-coach, for taking away the plaintiff's slave, evidence may be given on the part of the defendant that the plaintiff had given the slave a written permission to seek a new master; and if such permission be without limitation of time or place, the plaintiff cannot recover. *Harrison v. Evans*, 364.
140. The defendant's office-keeper is a competent witness for the defendant, because he is equally liable to an action by the plaintiff and by the defendant. *Ibid.*
141. If upon cross examination it appears that the witness is interested, the Court will instruct the jury that his testimony is not evidence. *Brohawn v. Van Ness*, 366.

EVIDENCE, (*Continued.*)

142. A lease for ninety-nine years, not acknowledged and recorded, is not good for seven years, but is evidence of the rate of rent in an action for use and occupation. *Ibid.*
143. If a statute makes it felony to steal the notes of any incorporated bank, the statute by which that bank was incorporated, thereby becomes a public statute. *United States v. Porte*, 369.
144. A free black man born of a white woman is a competent witness against a white man. *Minchin v. Docker*, 370.
145. Evidence that a black man has for many years publicly acted as a free man, and has generally been reputed to be free, rebuts the presumption of slavery arising from color, and is evidence that he was born of a white woman. *Ibid.*
146. A slave is a competent witness for a free black man, on a criminal prosecution. *United States v. Shorter*, 371.
147. A witness is not competent to testify as to the similitude of handwriting, who has only seen, for a few minutes, papers acknowledged by the defendant to be in his handwriting. *United States v. Johnson*, 371.
148. Upon an application for a bench-warrant on a charge of treason, as well as upon a motion to commit for the same cause, messages from the President of the United States to Congress may be read. *United States v. Bollman et al.* 373.
149. Upon trial of the issue upon the plea of performance, the plaintiff is not bound to produce the original covenant. *Beall v. Newton*, 404.
150. To prove a partnership, parol evidence of the contents of printed cards, cannot be given; nor can evidence of general reputation of partnership. *Wilson v. Colman*, 408.
151. Upon the issue of "no rent arrear," the landlord is not bound to prove that the distress was laid by his order. *McLaughlin v. Riggs*, 410.
152. Upon the trial of the issue upon the plea of payment, the plaintiff is not bound to produce the bond. *Darlington v. Groverman*, 416.
153. Parol evidence cannot be received of the contents of a letter written by the defendant to a third person. *Richardson v. Peyton*, 418.
154. A bill of parcels receipted by the defendant is not, *per se*, evidence of an unexecuted contract to deliver the goods, but is *prima facie* evidence of a contract executed. *Ibid.*
155. The original entries in the handwriting of the deceased clerk, must be produced; a copy is not sufficient. *Ellicott v. Chapman*, 419.
156. A deed transferring a slave in Maryland, not recorded, cannot be given in evidence without proof of its execution, although acknowledged before a justice of the peace in Maryland. *Lucy v. Slade*, 422.
157. A deed of lands in Maryland cannot be read in evidence unless recorded in Maryland. *McIver v. Kennedy*, 424.
158. Under the Virginia law respecting the taking of depositions, notice to the attorney-at-law is not sufficient. *Wheaton v. Love*, 429.
159. If a subscribing witness has not been inquired for at the place to which he was last traced, evidence of his handwriting cannot be admitted. *Cooke v. Woodrow*, 437.
160. Parol evidence may be given to explain the terms of a submission to arbitrators. *Faw v. Davy*, 440.
161. Record evidence only, of a highway in Virginia, can be received. *United States v. King*, 444.
162. The defendant's book of accounts, in his own handwriting, is not evidence for him, although it contains the first entry. *Bennett v. Wilson*, 446.
163. If several persons jointly concerned in an assault and battery, be separately indicted, each as for his own offence, and all tried at the same time by the same jury, one of the defendants may be examined as a witness for the others. *United States v. Hunter*, 446.
164. The Court will not permit the plaintiff to read to the jury, his own statement of his account; nor will the Court permit the jury to take minutes of the items, of which no evidence is offered. *Crease v. Parker*, 448.
165. The party will not be permitted to give parol evidence of a cause of caption of a deposition different from the cause stated by the magistrate who took the deposition; and if that cause be insufficient, the deposition will be rejected. *Wheaton v. Love*, 451.
166. When a witness states the grounds of his belief of a material fact, his belief, to-

EVIDENCE, (*Continued.*)

- gether with the reasons of his belief, are proper evidence to be left to the jury. *Wilson v. McClean et al.* 465.
167. The rent rolls and books of the lord proprietors of Maryland may be given in evidence to supply the want of a deed; and may be explained by parol. *Contee v. Godfrey*, 479.
168. The plaintiff's clerk, who puts a letter into the post-office, is a competent witness for the plaintiff without a release. *Dunlop v. Munroe*, 536.
169. Parol evidence is admissible to prove that A. B. before whom a deposition was taken, was a justice of the peace. *Ibid.*
170. It is to be presumed, *primâ facie* that a sworn officer has discharged his duty faithfully. *Ibid.*
171. The Court will not grant a commission, in a civil action at common law, to take the deposition of a witness living in Virginia within one hundred miles of the place of trial; because he may be summoned to attend personally. *Wellford v. Miller*, 485.
172. The person in whose favor a letter of guaranty was given may be examined as a witness for the plaintiff; his declarations, therefore, cannot be given in evidence. *Reid et al. v. Hodgson*, 491.
173. It is not necessary that the handwriting of the party should be proved by a person who has seen him write. *Ibid.*
174. A deposition taken, but not used, by the plaintiff cannot be read in evidence by the defendant, if the testimony would not have been competent for the defendant if it had been taken on his part. *Ibid.*
175. If the testimony of the subscribing witness cannot be had, evidence may be given of his handwriting and of that of the maker of the instrument; and it is not necessary that the jury should, by the evidence, be satisfied of the handwriting of the subscribing witness, if they are satisfied as to that of the maker. *Cooke v. Neale*, 493.
176. The principal obligor in a bond, is a competent witness for the surety. *Harper v. Smith*, 495.
177. An averment that the usurious contract was made in November, is supported by evidence that it was made in September; the variance is not material. *Ibid.*
178. In an action against an indorser of a promissory note a record of a judgment upon the same note, between other parties, cannot be given in evidence, unless the note itself be produced, and the defendant's indorsement proved. *Welch v. Lindo*, 497.
179. Notice, to produce a book of accounts, given on the preceding evening, is sufficient when the counting-house of the party is near the court-house. *Shreve v. Dulany*, 499.
180. From the defendant's express promise to pay for the goods, the jury may infer that they were got by the order of the defendant. *Ibid.*
181. A former recovery may be given in evidence upon *nil debet*. *Welch v. Lindo*, 508.
182. A former recovery upon a count for goods sold and delivered, may be given in evidence upon an action of debt upon a promissory note, with an averment that the judgment was confessed, in the former action, upon and for the note now declared upon. *Ibid.*
183. An execution is not the best evidence of a judgment. *Smallwood v. Violet*, 516.
184. Free-born negroes, not subject to any term of servitude by law, are competent witnesses in all cases. Color alone is no objection to a witness. *United States v. Mullany*, 517.
185. A slave is not a competent witness against a free-born mulatto not subject to any term of servitude by law. *United States v. Peggy Hill*, 521.
186. Possession of tobacco-notes is evidence of possession of the tobacco which they represent. *Hance v. McCormick*, 522.
187. The affidavit of a manumitted negro is a sufficient ground for an order to issue a summons returnable immediately, upon a petition for freedom. *Negro Nan v. Moxley*, 523.
188. The Court will not permit a party to prove other fraudulent transactions of the other party with strangers, to corroborate the charge of fraud in the present case. *Jones et al. v. Knowles*, 523.
189. If the notary testifies that he is certain, from the memorandum in his book, that the demand was made as there stated, his testimony is competent testimony to the jury. *Thornton v. Caldwell*, 524.

EVIDENCE, (*Continued.*)

190. Witnesses may be examined each out of the hearing of the others. *Joice v. Alexander*, 528.
191. The reputation of freedom which may be given in evidence upon a trial of freedom, must be a reputation among free white persons who are dead, or whose death may be presumed. *Ibid.*
192. The deposition of a deceased person, taken in another cause, may be read as hearsay. *Ibid.*
193. The superintendent of the city of Washington is a competent witness for the plaintiffs in a suit brought in the names of the former commissioners, to whose rights and duties he has succeeded. *Thornton v. Stoddert*, 534.
194. If a notary public produces his book containing his memorandum of the demand, and testifies that he made it at the time and that he is sure that it is correct and has not been altered; this is competent evidence, to the jury, of the demand, although he has no recollection of the act of demanding. *Ibid.*
195. If the defendant take and return the deposition of an interested witness, he cannot object to its being read on account of the interest of the witness. *Quære. Henry v. Ricketts et al.* 545.
196. If the Court is equally divided on an objection to evidence, the objection does not prevail. *Ibid.*
197. At the hearing of a cause in chancery the court will not receive *vivâ voce* testimony unless to prove exhibits. *Debatts v. Bacon*, 569.
198. A creditor of a firm is a competent witness to prove its existence. *Bank of Alexandria v. Mandeville*, 575.
199. The wife of one of the defendants is not a competent witness for the plaintiff although her husband has been discharged under the insolvent act. *Ibid.*
200. A stockholder in a company who holds stock in the plaintiff's bank, is a competent witness for the plaintiffs. *Ibid.*
201. The record of other suits between the defendant and other plaintiffs cannot be read in evidence by the plaintiffs to show fraud in the dissolution of the partnership. *Ibid.*
202. If the drawer and payee of a check upon a bank reside in the town where the bank is, and the drawer be insolvent, the jury cannot, in law, infer from those facts, that the plaintiffs had used due diligence in demanding payment and giving notice to the defendant. *McKinder v. Dunlap*, 584.
203. The mother of a bastard is a competent witness for the United States on an indictment of the supposed father under the Maryland Act of 1781, c. 13. *United States v. Collins*, 592.
204. Evidence of the likeness of the child to its supposed father is not admissible. *Ibid.*
205. The confession of the supposed father of a bastard having been given in evidence, the defendant was not permitted to give in evidence his declarations at the same time that others also had connection with the mother. *Ibid.*
206. A request by the indorser of a note, to the holder, to push the maker, is not evidence of waiver of demand and notice; but is evidence from which the jury may infer due demand and notice. *Riggs v. St. Clair*, 606.

EXCEPTIONS.

The Court will not sign a bill of exceptions which states that it contains all the evidence in the cause, unless that fact be agreed by the parties. *Lyles v. Mayor & Commonalty of Alexandria*, 361.

EXECUTION.

1. A *fiери facias*, received by the marshal before an attachment for rent not due, is entitled to priority and must be first satisfied. *Stieber v. Hoyer*, 40.
2. An execution levied on the goods of the drawer of a foreign bill of exchange, is no bar to a judgment against the indorser, if the goods have not been sold for want of buyers. *Hodgson v. Turner*, 74.
3. It is no bar to execution upon a *supersedeas* in Washington county, that the plaintiff has recovered another judgment in Alexandria county, upon the same cause of action, if it be not satisfied. *Curry v. Lovell*, 80.
4. A *fiери facias* delivered to the marshal will supersede a *fiери facias* subsequently delivered to a constable and first levied. *Riddle v. The Marshal D. C.* 96.

EXECUTION, (*Continued.*)

5. Although there be a stay of execution for two months, yet the writ of error is no *supersedeas* unless served within ten days after the judgment. *Thompson v. Voss*, 108.
6. If execution issue before the end of the term in which judgment was rendered, it may, on motion, be quashed, and the judgment rescinded. *Sharpless v. Robinson*, 147.
7. After the year has elapsed, execution cannot issue here, upon a judgment rendered in Maryland, without a *scire facias*, notwithstanding the 13th section of the Act of Congress of the 27th February, 1801. *McDonald v. White*, 149.
8. A discharge of the appearance bail, arrested upon a joint *ca. sa.* against himself and his principal, does not release the principal. *Watson v. Summers*, 200.
9. An agent of the plaintiff has a right to enter the house of the defendant with the officer, to show him the defendant's goods to be taken on a *feri facias*. *United States v. Baker*, 268.
10. When an execution is countermanded at the request of the defendant and for his accommodation, the plaintiff may have a new execution, after the year and day, without *scire facias*. *Phillips v. Lowndes*, 283.
11. Upon surrender of the debtor, upon a *ca. sa.* the court will not, without motion, order him to be committed in execution. *Peter v. Suter*, 311.
12. The constable is not entitled to any fee for returning an execution not served. *United States v. Little*, 411.
13. A clerical mistake in entering a judgment may be corrected at a subsequent term, and an execution issued thereon may be quashed. *Pierce v. Turner*, 433.

EXECUTOR.

1. Evidence may be given to show that the defendant is executrix in her own wrong, without charging her as such. *Harper v. West's Ex'r*, 192.
2. An executor may be ruled to plead before the expiration of the year after letters granted. *Frazier v. Brackenridge*, 203.
3. An executor *de son tort* is liable for the value of the goods taken and used by him. *Baysand v. Lovering and wife*, 206.
4. If the jury find for the plaintiff, on *plene administravit*, he shall have judgment *de bonis testatoris*, for his whole debt. *Fairfax v. Fairfax*, 292.
5. A direction to executors, (in case the rents of certain property should not be sufficient for the purpose,) to adopt some mode for raising the deficiency out of other parts of the estate, gives them power to sell the reversion of the lands. *Roberdeau v. Roberdeau*, 305.
6. The orphan's court of Alexandria county cannot, in any case, grant letters testamentary without security, unless the testator's personal estate is sufficient to pay all the debts. *Ex parte Lee, Ex'r of Craik*, 394.
7. Counts, charging the defendants as executors upon the promise of their testator, and upon their own promise as executors in consideration of assets, may be joined in the same declaration; and the judgment upon each count will be *de bonis testatoris*. *Dixon v. Ramsay*, 472.
8. In actions against executors the act of limitations may be pleaded after office judgment. *Wilson v. Turberville's Ex'rs*, 492.

FACTOR.

When bills are drawn on a consignee, on a shipment of tobacco, he has no right to hold up the tobacco, after the time of the payment of the bills, without orders, but should sell to meet the payment. *Potts v. Findlay et al.* 514.

FARO-TABLE.

1. Under the Act of Maryland 1797, c. 110, the offence of keeping a faro-table can only be committed by a tavern-keeper, or retailer of spirituous liquors. *United States v. Lefevre*, 244.
2. The gratuitous distribution of ardent spirits at a public gaming-table does not constitute the keeper of the gaming-table a retailer of spirituous liquors. *United States v. Mickle*, 268.

FEES.

1. The marshal is entitled to a fee of ninety pounds of tobacco for impanelling a jury in a criminal prosecution. *United States v. McDonald*, 78.

FEES, (Continued.)

2. The marshal's commission of five per cent. may be included in the replevin bond for rent. *Alexander v. Thomas*, 92.
3. The marshal may include his commissions in a forthcoming bond, and is also entitled to his commission upon an execution on the bond. *Thomas v. Brent*, 161.
4. After the term in which a rule is laid for security for fees, the clerk, upon a motion for judgment on the rule, need not prove the plaintiff to be a non-resident. *Devigny v. Moore*, 174.
5. A witness may be allowed his fees although not regularly summoned. *United States v. Williams and Ray*, 178.
6. A witness cannot have an attachment for his fees until he has served an order of court upon the party to pay them. *Sadler v. Moore*, 212.
7. Witnesses are entitled to their fees although the summons be served by a private person. *Power v. Semmes*, 247.
8. If the plaintiff has received the debt and costs, the marshal cannot detain the defendant upon a *ca. sa.* for his poundage. *Causin v. Chubb*, 267.
9. The sureties of a sheriff, in Virginia, are not liable for officers' fees, unless the account of the same shall have been delivered to the sheriff for collection before the first of March. *Governor of Virginia v. Turner's Sureties*, 286.
10. A rule having been laid to give security for fees is not, of itself, sufficient ground for a rule to give security for costs. *Brohawn v. Van Ness*, 366.
11. The constable is not entitled to any fee for returning an execution not served. *United States v. Little*, 411.
12. The marshal is entitled to a fee of \$5.50 for summoning and impanelling a coroner's inquest in the county of Alexandria. *Brent v. Justices of the Peace*, 434.

FELONY.

1. Every felony is not a capital case, and a prisoner indicted for counterfeiting a note of the Bank of the United States is not entitled under the Act of Congress of the 30th of April, 1790, § 29, to a copy of the indictment and a list of the witnesses two days before pleading, although the offence is made felony by the statute. *United States v. Williams and Ray*, 178.
2. If a statute makes it felony to steal the notes of any incorporated bank, the statute, by which that bank was incorporated, thereby becomes a public statute. *United States v. Porte*, 369.
3. An averment that a letter containing bank-notes, was fraudulently and improperly secreted, withheld, and taken, in the post-office, by the defendant, is not a charge of felony, so as to deprive the plaintiffs of their civil remedy. *Dunlop v. Monroe*, 536.

FIERI FACIAS.

1. A *fiери facias* received by the marshal before an attachment, for rent not due, must be first satisfied. *Stieber v. Hoyer*, 40.
2. An execution levied on the goods of the drawer, is no bar to a judgment against the indorser, if the goods have not been sold for want of buyers. *Hodgson v. Turner*, 74.
3. A *fiери facias* delivered to the marshal will supersede a *fiери facias* subsequently delivered to a constable but first levied. *Riddle v. Marshal D. C.* 96.
4. Upon a breach assigned in not paying over money received upon a *fiери facias*, the plaintiff must prove that the sheriff received the money before the return day of the execution. *Governor of Virginia v. Wise et al.* 142.

FIXTURES.

1. Franklin stoves, fixed in the usual manner with bricks and mortar, pass to the vendee of the house. *Smith v. Heiskell*, 99.
2. A tenant who has erected a wooden shed upon posts inserted two feet into the earth, has a right to remove it during the term. *Krouse v. Ross*, 368.

FORCIBLE ENTRY AND DETAINER.

1. In forcible entry and detainer, it is not necessary that it should appear upon *certiorari*, that the inquest was taken upon the spot where the force was used; nor that the jurors should appear to be qualified according to the requisites of the common law. *United States v. Donohoo*, 474.

FORCIBLE ENTRY AND DETAINER, (Continued.)

2. In Alexandria county, a *certiorari*, in forcible entry and detainer, may be issued by one judge, in vacation; and the inquisition may be traversed. *United States v. Browning*, 500.
3. No plea will be allowed, but a traverse of the force or a possession for three years. *Ibid.*
4. Restitution will not be awarded unless some person be held out of possession, who has a right of possession. *Ibid.*
5. The Act of Virginia does not punish the force; it only provides for restitution. *Ibid.*

FOREIGN SENTENCE.

1. A sentence of a foreign court of Vice-Admiralty, condemning a vessel as enemy-property, is not conclusive evidence of violation of neutrality. *Croudson v. Leonard*, 291.
2. The sentence and proceedings of a foreign court of Vice-Admiralty, condemning the goods as enemy-property, are not conclusive evidence of that fact, in a suit upon a policy of insurance. The sentence may be invalidated by the evidence contained in the record of the proceedings. *Lambert v. Smith*, 361.

FORGERY.

In an indictment for forgery of a bill, it is not necessary to set forth the indorsements, but evidence of the defendant's indorsement may be given, to show his fraudulent intent, although his indorsement is not averred in the indictment. *United States v. Peacock*, 215.

FRAUD.

1. Upon proof of fraud the Court will not permit the debtor to take the insolvent oath under the law of Virginia. *Camellos v. Reverez*, 62.
2. A conditional promise to pay the debt of another is within the statute of frauds. *Barry v. Law*, 77.
3. An entry in the defendant's books, not signed by any one, is not a sufficient note in writing to take the case out of the statute of frauds. *Ibid.*
4. If the plaintiff obtain the defendant's acceptance by a fraudulent practice, he cannot recover upon it. *Wilson v. Cromwell*, 214.
5. Acts done by the vendor alone will not take a verbal sale of land out of the statute of frauds. *Reeves v. Pye*, 219.
6. An insolvent who obtains his discharge by fraud is not discharged in due course of law. *Slacum v. Simms and Wise*, 242.
7. A court of equity will not decree the execution of a verbal agreement to pay the debt of another, although confessed in the answer, if the statute of frauds be pleaded and insisted upon in the answer. *Thompson et al. v. Jamesson*, 295.
8. A parol gift of a slave in Virginia, in 1784, was void under the statute of 1758, although possession accompanied and followed the gift; and it was not made valid by the act of 1787. *Lee v. Ramsay*, 435.
9. A deed of gift of a slave in 1790 was void unless possession accompanied and followed the deed. *Ibid.*
10. A promise, by the defendant when compromising with his creditors, to pay the plaintiff an additional sum, is a fraud upon the other creditors, and is void. *Bartleman v. Douglass*, 450.
11. A marriage settlement of the intended wife's goods, although not recorded, protects the goods from the creditors of the husband. *Pierce v. Turner*, 462.
12. The Court will not permit a party to prove other fraudulent transactions of the other party with strangers, to corroborate the charge of fraud in the present case. *Jones v. Knowles*, 523.
13. Fraud may be given in evidence upon *non assumpsit*, for it avoids the contract altogether. *Morrison v. Clifford*, 585.

FREEDOM.

1. A certificate of an oath, taken by a slave-owner, may be given in evidence, although it varies from the oath required by law. *Negro Rose v. Kennedy*, 26.
2. If the owner send his slave out of Virginia for three years, and then bring the slave back, it is not such a bringing into the Commonwealth as entitles the slave to freedom under the second section of the Act of 17th December, 1792. *Negro Sylvia v. Coryell*, 32.

FREEDOM, (*Continued.*)

3. Upon devise that a slave should be sold for eight years, after which he should be free, the term of eight years shall begin to run from the death of the testator, or within a reasonable time thereafter. *Negro Basil v. Kennedy*, 199.
4. A petitioner for freedom has not a right to go in search of his witnesses. *Negro Moses v. Dunnaho*, 315.
5. Bringing a slave from Alexandria to Washington is an importation contrary to the Act of Maryland, 1796, c. 67. *Negro Wm. Foster v. Simmons*, 316.
6. A petitioner for freedom, in custody, will not be discharged upon the request of the master, unless he give security to have the petitioner forthcoming, &c. to prosecute his petition. *Ex parte Negro Letty*, 328.
7. Upon a petition for freedom the Court will not require the defendant to give security for the wages of the petitioner during the litigation. *Negro Ben v. Scott*, 350.
8. An affidavit is not necessary to continue a suit for freedom at the first term. *Id.* 365.
9. Evidence that a black man has, for many years, publicly acted as a freeman, and been generally reputed to be free, rebuts the presumption of slavery arising from color. *Minchin v. Docker*, 370.
10. A slave coming from Virginia into Maryland more than a year after his master, and sold, is entitled to freedom under the law of Maryland of 1796, c. 67. *Negro Moses v. Donahoo*, 370.
11. The owner of a slave who sues for freedom must pay the prison fees if he will not give the security required by the law of Virginia. *Ex parte Negro Amy*, 392.
12. A sale of a slave upon the express condition that he should be free at the end of six years, is not a manumission under the Maryland law of 1796, c. 67. *Negro Fidelio v. Dermott*, 405.
13. A manumission by will is not in prejudice of creditors, if the real and personal estate are sufficient, without the value of the manumitted slave, to pay all the debts of the testator. *Ibid.*
14. A manumission by will, after a term of years, is not revoked by a codicil ordering the sale of all the testator's slaves, if at the time of making the codicil, their term of service had not expired. *Ibid.*
15. The general issue on a petition for freedom is that which puts in issue the single question whether free or not. *Negro Ben v. Scott*, 407.
16. A slave imported does not gain his freedom by the omission of the master to prove to the satisfaction of the naval officer or collector of taxes, the residence of the slave in the United States according to the Maryland Act of April, 1783, c. 23. *Ibid.*
17. An injunction to prevent a person from taking away a colored woman who has sued for her freedom in this court, will not be granted upon a mere statement of the plaintiff's apprehension. *Negro Jenny v. Crase*, 443.
18. The promise of a slave does not bind him when free, although it be to pay money borrowed by which he obtained his freedom. *Crease v. Parker*, 448.
19. Money advanced to a slave to enable him to purchase his freedom cannot be recovered of him after his emancipation, although he acknowledge the debt after suit brought. *Id.* 506.

FREIGHT.

Trover will not lie against the master of a vessel for the cargo, unless the freight has been paid or tendered, or the payment be waived; nor if the goods were lost that they did not come to the use of the defendant. *Hodgson v. Woodhouse*, 549.

GAMING.

1. This court has jurisdiction of prosecutions for gaming under the law of Virginia, although that law directs the prosecution to be had before a justice of the peace. *United States v. Heinegan*, 50.
2. An indictment will not lie, under the Virginia Act, for suffering gaming in the defendant's house; because the Act has given an action of debt to the informer. *United States v. Gadsby*, 55.
3. A *capias* may be issued as the first process against a person for unlawful gaming. *United States v. Cottom*, 55.

GAMING, (Continued.)

4. Upon an indictment for keeping a gaming-table in a booth upon the race-field contrary to the Act of Maryland, the traverser is equally guilty whether he acted as principal, or as agent for the owner. *United States v. Connor*, 102.
5. Under the Maryland Act 1797, c. 110, the offence of keeping a faro-table can only be committed by a tavern-keeper, or retailer of spirituous liquors. *United States v. Lefevre*, 244.
6. The gratuitous distribution of ardent spirits at a public gaming-table does not constitute the keeper of the table a retailer of spirituous liquors within the meaning of the Act of Maryland. *United States v. Mickle*, 268.
7. Playing at any game, even for money, is not, of itself, an offence at common law. The offence is created by statute and can only be punished as the statute directs. *United States v. Willis*, 511.
8. The game called "equality" is a "device" prohibited by the Act of Maryland, 1797, c. 110. *United States v. Speeden*, 535.
9. A public gaming-house is a public nuisance. *United States v. Ismenard*, 150.

GEORGETOWN.

1. The corporation of Georgetown had no power, in 1803, to grant retailing licenses. *United States v. Kaldenbach*, 132.
2. The original by-laws of Georgetown need not be made under the corporate seal. *Holmead v. Fox*, 138.
3. A constable of the county of Washington, residing in Georgetown, is a constable of the town of Georgetown and precincts, within the meaning of the by-law concerning hogs. *Ibid.*
4. An indictment will not lie for forestalling the Georgetown market, contrary to the by-law. *United States v. Kennedy*, 312.
5. The mayor of Georgetown may, in the town, do any act which a county justice of the peace can do in his county. *Hodgson v. Mountz*, 366.
6. The corporation of Georgetown cannot impose a penalty on hack-owners residing out of Georgetown for bringing passengers into Georgetown from the city of Washington, if they take only the city price for driving to the verge of the city. *Lenox v. Corp. of Georgetown*, 608.

GOOD BEHAVIOR.

After acquittal, the court will not require the prisoner to give security for his good behavior. *United States v. Venable*, 417.

GOODS AND CHATTELS.

Bank-notes are not goods and chattels. *United States v. Morgan*, 278.

GUARDIAN.

1. The court will appoint a guardian *ad litem* to defend an infant defendant. *Barclay v. Govers*, 147.
2. If an infant is brought into court, a guardian *ad litem* may be appointed without commission. *Reinhart v. Orme*, 244.
3. A guardian appointed in one county in Maryland is competent to give a valid receipt for the purchase-money of land in another county. *Brooke v. Potowmack Company*, 526.

HABEAS CORPUS.

1. Upon petition for a writ of *habeas corpus*, the petitioner must produce a copy of the warrant of commitment, or an affidavit that the officer refused to give a copy. *Harrison's case*, 159.
2. An attachment for not returning a writ of *habeas corpus* will not be issued until three days shall have expired after service of the writ. *United States v. Bollman et al.* 373.
3. When a debtor is in the prison bounds, the court will not award a *habeas corpus* to discharge him, on the ground that his creditor has refused to pay his daily allowance. *Wilson v. The Marshal, D. C.* 608.

HACKNEY-COACHES.

1. The Corporation of Washington had authority, under the charter of 1802, § 7, to regulate and license hackney-coaches. *The Mayor &c. of Washington v. Wheaton*, 318.
2. See GEORGETOWN. 6. *Lenox v. Corp. Georgetown*, 608.

HIGHWAY ROBBERY.

No road in Virginia is a highway, within the statute which takes away the benefit of clergy in certain cases, unless it be a public road laid out according to law; no evidence of which can be received but the record. *United States v. King*, 444.

IMPRISONMENT.

1. Upon an indictment at common law for a riot in Alexandria county the term of imprisonment is not to be assessed by the jury. *United States v. McFarlane et al.* 163.
2. Imprisonment is not a necessary part of the punishment of riot at common law. *Ibid.*

INDICTMENT.

1. In an indictment for selling whiskey, the day is not material. *United States v. Burch*, 36.
2. In an indictment for keeping a disorderly house, the time is not material. *Id.* 36.
3. The court in Washington, may order an indictment to be sent to the grand jury without a previous presentment for the same offence. *United States v. Mudden*, 45.
4. All the acts of selling spirituous liquors without license, before conviction, constitute but one offence; and the day laid in the indictment is not material, if it be within twelve months before filing the information. *Commonwealth v. Smith*, 46.
5. An indictment will not lie, under the Virginia Act, for suffering gaming in the defendant's house; because the act has given an action of debt to the informer. *United States v. Gadsby*, 55.
6. No information or indictment will lie upon a by-law of the corporation of Alexandria. *Commonwealth v. Howard*, 61.
7. The want of the name of a prosecutor at the foot of the indictment is no ground for arresting the judgment. *United States v. Jamesson*, 62.
8. The name of a prosecutor must be written at the foot of an indictment for keeping a bawdy-house. *United States v. Rawlinson*, 83.
9. On a trial for larceny of the goods of T. L., evidence that they were the property of a deceased person, in the possession and management of T. L., will support the indictment. *United States v. Barlow*, 94.
10. *Quære*, whether upon an indictment, on a statute, charging an act to be done knowingly, the *scienter* must be proved if the statute does not use the word "knowingly." *United States v. McCormick*, 106.
11. An indictment may be sustained against a constable for acting as such without giving bond. *United States v. Evans*, 149.
12. Upon a joint indictment the judgment must be several. *United States v. Isme-nard*, 150.
13. Riot, and assault and battery may be joined in the same indictment. *United States v. McFarlane et al.* 163.
14. A prisoner indicted for counterfeiting a note of the Bank of the United States is not entitled, under the Act of Congress of 30th of April, 1790, § 29, to a copy of the indictment and a list of the witnesses, two days before pleading, although the offence is made felony by the statute. *United States v. Williams and Ray*, 178.
15. In an indictment for forgery of a bill, it is not necessary to set forth the indorsements. *United States v. Peacock*, 215.
16. An indictment will not lie for forestalling the Georgetown market, contrary to the by-law. *United States v. Kennedy*, 312.
17. It is no ground of general demurrer to an indictment for misdemeanor under the laws of Virginia of 1792 and 1795, that the name of a prosecutor is not written at its foot. *United States v. Sandford*, 323.
18. An indictment upon the Maryland Act of 1793, c. 35, for stealing bank-notes, must state of what bank the stolen notes were, and whether the bank was incorporated by the United States, or by a particular State. It is not sufficient to make the averment in the words of the act. *United States v. Porte*, 369.
19. When a statute merely alters the punishment of a common-law offence, the statutory punishment may be inflicted, although the indictment does not conclude *contrâ formam statuti*. *United States v. Norris*, 411.

INDICTMENT, (*Continued.*)

20. If several persons, jointly concerned in an assault and battery, be separately indicted, each as for his own offence, and all tried at the same time by the same jury, one of the defendants may be examined as a witness for the others. *United States v. Hunter et al.* 446.
21. In order to make those liable who were only present, aiding and abetting, it is not necessary that they should be indicted jointly, nor with a *simul cum. Ibid.*
22. The finding of an informal presentment is not the finding or instituting an indictment so as to take the case out of the act of limitations of public prosecutions, of 30th April, 1790, § 32. *United States v. Slacum*, 485.
23. Upon presentment by the grand jury, the Court will order an indictment to be sent up without the name of a prosecutor, upon the suggestion of the Attorney of the United States. *United States v. Dulamy*, 510.
24. The prosecutor whose name is written at the foot of the indictment is not a competent witness for the prosecution. *United States v. Birch*, 571.
25. In an indictment for selling spirituous liquors, the day is not material. *Ibid.*
26. An indictment against a minister for joining in marriage persons under age, without the consent of their parents or guardians, contrary to the Act of Maryland, 1777, c. 12, § 9, must aver that the defendant was, at the time of solemnizing the marriage, a minister authorized and qualified according to the act, to celebrate the rite of matrimony; it must also, if it contain an averment that it was done without the consent of the parents, aver that there was a parent then living, and that there was no guardian who could consent, or that it was without the consent of the guardian, as well as without the consent of the parents. *United States v. McCormick*, 593.
27. When a statute inflicts a penalty upon persons of a certain description only, it is necessary, in an indictment upon that statute, to aver all the facts necessary to show that the defendant was a person of that description at the time of committing the act. *Ibid.*
28. The addition "clerk" to the name of the defendant is not a sufficient averment that he was, at the time of the marriage, a minister duly authorized to celebrate that rite. *Ibid.*
29. When negative words constitute part of the description of an offence, they must be used in the indictment. *Ibid.*

INFANT.

1. The Court will appoint a guardian *ad litem* to defend an infant defendant. *Barclay v. Govers*, 147.
2. If an infant is brought into court a guardian *ad litem* may be appointed without commission. *Reinhart v. Orme*, 244.
3. Upon the trial of an issue upon the plea of infancy to an action upon a promissory note, the plaintiff is not bound to produce the note. *Davidson v. Henop*, 280.
4. Infancy cannot be given in evidence upon *nil debet*. The promissory note of an infant is voidable, but not void. *Young v. Bell*, 342.
5. An infant cannot bind himself as an apprentice; nor can a master assign the indentures of apprenticeship. *Handy v. Brown*, 610.

INFORMATION.

1. It must appear, upon a special verdict, that the offence was committed before the filing of the information. *Commonwealth v. Leap*, 1.
2. If the information, upon a by-law, states that the penalty accrued to the Commonwealth when by the charter it accrued to the town, the judgment must be arrested. *Commonwealth v. Hoeff*, 21.
3. An information may be amended by stating that the penalty accrued to the town instead of the commonwealth. *Commonwealth v. Smith*, 22.
4. An information may be amended. *United States v. Evans*, 55; *United States v. Shuck*, 55.
5. In an information for selling spirituous liquors without license, it is not necessary to specify the particular kind of liquor, nor the person to whom sold. *United States v. Gordon*, 58.
6. All acts of selling before prosecution constitute but one offence. *Ibid.*

INFORMATION, (*Continued.*)

7. No information nor indictment will lie upon a by-law of the corporation of Alexandria. *Commonwealth v. Howard*, 61.
8. An information may be discontinued before the defendant's appearance. *Commonwealth v. Eakin*, 83.

INJUNCTION.

1. It is not necessary to give notice of the application for an injunction. *Love v. Fendall's Trustees*, 34.
2. The Court will grant an attachment for disobeying an injunction. *Munroe v. Harkness*, 157; *Munroe v. Bradley*, 158.
3. The Court, at an adjourned session, will not hear a motion to dissolve an injunction, upon notice given after the first session of the term. *Burford v. Ringgold*, 253.
4. The absence of a witness at a trial at law is no ground of equity to obtain an injunction to stay proceedings at law upon the judgment. *Chapman et al. v. Scott*, 302.
5. Notice of motion to dissolve an injunction given on the first day of the term, is notice that the motion is to be made at the next succeeding term. *Ramsay v. Wilson*, 304.
6. An injunction to stay execution upon a judgment at law for the purchase-money of land, on the ground of the difficulty of obtaining a title from the infant heirs of the vendor, cannot be supported if the purchaser neglected to pay the money and demand a title in the lifetime of the vendor, and if the heirs are not made parties to the suit. *Prout v. Gibson*, 389.
7. A general allegation of difficulty in procuring vouchers, or of unavoidable delay in settling an administration account, is no ground of equity to enjoin a judgment at law. *Wilson's Adm'rs v. Bastable*, 394.
8. The Court will not enjoin what may or may not be a nuisance. *Ramsay v. Riddle et al.* 399.
9. An injunction to prevent a person from taking away a colored woman who has sued for her freedom, will not be granted upon the mere statement of the plaintiff's apprehension. *Negro Jenny v. Crase*, 443.
10. Notice to dissolve an injunction must be given ten days before the term: If given in term, a term's notice is required. *Stoddert v. Waters*, 483.

INQUEST.

1. Neither by the common law nor by the statute of Virginia, is the coroner bound to put in writing, the effect of the evidence given upon an inquisition unless the offence be found to be murder or manslaughter. *United States v. Faw*, 456.
2. This Court has jurisdiction to quash an inquisition taken under the charter of the Georgetown and Alexandria Turnpike Company. *Georgetown and Alexandria Turnpike Co. v. Custis*, 585.
3. The inquisition taken under the charter of the Georgetown and Alexandria Turnpike Company need not be under the seals of the jurors. *Ibid.*
4. If the jurors are not disinterested the inquisition will be quashed. *Ibid.*

INQUIRY.

1. Upon a writ of inquiry, in Virginia, the plaintiff's own oath is evidence of the amount of his claim. *Mandeville v. Washington*, 4.
2. Upon executing a writ of inquiry upon a judgment by default, the jury must find at least one mill in damages. *Frazier v. Lomax*, 328.

INSOLVENT.

1. A motion may be made against a sheriff in the name of the original plaintiff, although he has taken the insolvent oath. *Fendall v. Turner*, 35.
2. Upon proof of fraud the Court will not permit the debtor to take the insolvent oath under the law of Virginia. *Camellos v. Reverez*, 62.
3. The plaintiff may maintain the action, although discharged as an insolvent debtor under the law of Virginia since the cause of action accrued. *Ridgway v. Pancost*, 88.
4. A plaintiff who has been discharged under the insolvent law of Maryland, of 1774, since the commencement of the action, is still competent to maintain it. *Ardrey v. Wadsworth*, 109.

INSOLVENT. (*Continued.*)

5. A discharge under the Maryland Act of 1774 is not valid, unless a copy of the certificate be affixed to the door of the county clerk's office. *Mountz v. Jones*, 212.
6. An insolvent who obtains his discharge by fraud is not discharged in due course of law. *Slacum v. Simms and Wise*, 242.
7. Bail will not be discharged by the production of the discharge of the principal as an insolvent debtor at the third term after the return of the *scire facias*. *Boyer v. Herty*, 251.
8. *Quære*, whether a defendant discharged under the insolvent law after arrest upon the *capias ad respondendum*, and before the return, can be compelled to appear to that action. *Stover v. Densley*, 267.
9. An insolvent debtor will be discharged from arrest for costs accruing partly before, and partly after his discharge under the insolvent act. *Tenny v. Densley et al.* 314.
10. It is no bar to the plaintiff's recovery that the maker of the note had, at the time it became payable, property enough to pay it, and that he and the plaintiff both resided in the same town, and that the plaintiff brought no suit against the maker. *Patton v. Violet*, 463.
11. The insolvency which will excuse the plaintiff for not bringing suit against the maker, must be such as, in the opinion of the jury, would render a suit fruitless. *Ibid.*
12. If the maker was solvent when the note became payable, and the defendant, during such solvency, requested the plaintiff to sue the maker, and he did not, the defendant is discharged from liability, under the equity of the statute of Virginia. *Ibid.*
13. The discharge of the principal, under the insolvent act, before the return of the *ca. sa.*, may be pleaded in bar to a *scire facias* against the bail. *Byrne v. Carpenter*, 481.
14. Ability, of the maker of a note, to pay part of his debts, is not evidence of his solvency. *Offutt v. Hall*, 504.
15. Upon the trial of allegations against an insolvent debtor, he may show that the party filing the allegations is not his creditor. *Mandeville v. Jamesson*, 509.
16. A discharge of a debtor under the Maryland insolvent law of January 3d, 1800, is a bar to an action for a debt contracted in Georgia, although the creditor always resided in South Carolina. *Wray v. Reily*, 513.
17. In an action by an insolvent debtor for the use of his trustee, the defendant may set off the plaintiff's note to a third person, with a blank indorsement, which came to the defendant's hands before the plaintiff's insolvency; but he cannot set off the joint note of the plaintiff and another. *Banks v. King*, 543.
18. A plea that the maker of the note had, at the date of the writ, goods and chattels to greater amount than the plaintiff's claim, is no answer to an averment of insolvency. *Janney v. Geiger et al.* 547.
19. Insolvency of the maker of a note, in Virginia, dispenses with a suit against him; and also with demand and notice. *Offutt v. Hall*, 572.

INSURANCE.

1. Misrepresentation of the age and size of a vessel will not avoid a valued policy. *Straas v. Marine Ins. Co. of Alexandria*, 343.
2. If there be no warranty of neutrality the policy covers belligerent risks. *Ibid.*; *Hodgson v. Marine Ins. Co. of Alexandria*, 460.
3. The admissions of one of several underwriters on the same policy, cannot be given in evidence against another underwriter, nor the admissions of a committee of the company, not authorized by the articles of association to make admissions. *Lambert v. Smith*, 361.
4. The plaintiff cannot give evidence that other underwriters upon the same policy have paid upon the same risk. *Ibid.*
5. The sentence and proceedings of a foreign court of vice-admiralty, condemning the goods as enemy-property, are not conclusive evidence of that fact in a suit upon the policy. *Ibid.*
6. Upon a valued policy, a misrepresentation as to the size and age of the vessel, is no defence, although averred to be material as to the contract. *Hodgson v. Marine Ins. Co. of Alexandria*, 460.
7. It is no defence to an action upon a policy, that the premium has been perpetually enjoined. *Ibid.*

INTEREST.

1. The jury may, or may not, allow interest upon the balance of an account. *Killingly v. Taylor*, 99.
2. In an action of covenant for rent, the landlord cannot recover interest. *Gill v. Patton*, 188.
3. *Quære*, whether interest can be recovered in an action for money had and received. *Gantt v. Jones*, 210.
4. In a judgment upon an attachment, interest cannot be added. *Power v. Semmes*, 247.
5. Rule for settling interest. *Dunlop v. Alexander*, 498.

JUDGMENT.

1. The defendant cannot set off a joint judgment recovered by himself and wife (for slander of the wife) against the plaintiff. *Sutton v. Mandeville*, 2.
2. It is no cause for arresting judgment that the jury found the damages in pounds, when the damages in the declaration are laid in dollars. *Butts v. Shreve et al.* 40.
3. It is no cause for arresting the judgment, that the debt is reduced by offsets below the original jurisdiction of the Court. *McKnight v. Ramsay*, 40.
4. Judgment will not be rendered on motion of one surety against another, unless the insolvency of the principal be fully proved. *White v. Perrin*, 50.
5. The want of the name of a prosecutor at the foot of an indictment for a misdemeanor is no ground for arresting the judgment. *United States v. Jamesson*, 62; *United States v. Singleton*, 237.
6. Judgment entered by mistake of the clerk, may be set aside at the next term, and the execution quashed. *United States v. McKnight*, 84.
7. A record of a former judgment between the same parties, upon the same cause of action, may be given in evidence upon *non assumpsit*. *Ridgway v. Ghequier*, 87.
8. Variance between the *capias* and the declaration cannot be pleaded to set aside an office-judgment. *Hartshorne v. Ingle*, 91.
9. Judgment for sterling money. — Irish sterling. *Bond v. Grace*, 96.
10. *Nil debet* is not a proper plea here, to an action of debt upon a judgment of a State court. *Bastable v. Wilson*, 124.
11. The Court will permit a defendant to confess judgment for the whole amount of damages laid in the writ, although no declaration be filed. *McNeil v. Cannon*, 127.
12. If the clerk neglect to strike out a judgment, as ordered by the Court, it may be done by order of the Court at the next term, on affidavit of the facts. *United States v. Smith*, 127.
13. On a motion to set aside an office-judgment on an injunction bond, the Court will not suffer the defendant to plead that the obligee was dead at the time of the execution of the bond. *Porter v. Marsteller*, 129.
14. *Indebitatus assumpsit* lies upon the judgment of a justice of the peace. *Green et al. v. Fry*, 137.
15. If execution issue before the end of the term in which judgment was rendered, it may, on motion, be quashed, and the judgment rescinded. *Sharpless v. Robinson*, 147.
16. Upon a joint indictment the judgment must be several. *United States v. Ismenard*, 150.
17. A defendant arrested to appear at next term cannot come in and confess judgment at this term; the writ being returnable to the next term. *Askew v. Smith*, 159; *Haden v. Perry*, 285.
18. Upon a judgment, on motion, upon a replevy-bond for rent, the plaintiff is entitled to costs of the motion. *Cooke v. Myers*, 166.
19. After conviction of assault and battery the Court will permit the defendant to give security to abide the judgment. *United States v. Greenwood*, 186.
20. Judgment in replevin, for double rent. *Alexander v. Harris*, 243.
21. In an action upon a bond conditioned to pay money by instalments, if the verdict be rendered before all the instalments are payable, the jury must find how much is due upon each instalment, and when payable; as well those to become payable as those already payable. *Davidson v. Brown*, 250.
22. An administrator, in Alexandria county, has a right at law to give a preference

JUDGMENT, (*Continued.*)

- to a creditor by confessing a judgment; and a court of equity will not interfere by injunction. *Wilson v. Wilson*, 255.
23. When the writ of inquiry is set aside by the defendant, the plaintiff may have the cause continued at the defendant's costs. *McCulloch v. Debutts*, 285.
 24. If the jury find for the plaintiff upon the issue of *plene administravit*, he shall have judgment *de bonis testatoris* for his whole debt. *Fairfax v. Fairfax*, 292.
 25. When a statute merely alters the punishment of a common-law offence, the statute punishment may be inflicted, although the indictment should not conclude *contra formam statuti*. *United States v. Norris*, 411; *United States v. Dixon*, 414; *United States v. King*, 444.
 26. A promise by an administrator to pay, in consideration of assets, will support a judgment *de bonis intestatoris*. *Faxon v. Dyson's Administrator*, 441.
 27. In an action, upon an auctioneer's bond, for not paying over to A. and B. money received for sales at auction, a rejoinder that it had not been established by a judgment that money was due to them by the auctioneer, is an issuable plea to set aside an office-judgment. *Mayor & Commonalty of Alexandria v. Moore*, 440.
 28. Upon a conviction of manslaughter at common law the Court will give judgment of fine and imprisonment under the Act of Congress of 30th of April, 1790. *United States v. McLaughlin*, 444.
 29. Upon counts in the same declaration charging the defendants as executors, upon the promise of their testator, and upon their own promise as executors in consideration of assets, the judgment, upon each count will be *de bonis testatoris*. *Dixon v. Ramsay*, 472.
 30. In an action against an indorser of a promissory note, a record of a judgment upon the same note between other parties, cannot be given in evidence unless the note itself be produced and the defendant's indorsement proved. *Welsh v. Lindo*, 497.
 31. The only judgment which the Court can give in a case of bastardy under the Maryland Act of 1781, c. 13, is that the defendant give security to indemnify the county. *United States v. Collins*, 592.

JURISDICTION.

1. The jurisdiction of the United States over the District of Columbia vested in them on the first Monday of December, 1800. *United States v. Hammond*, 15.
2. This Court has jurisdiction in trespass, although the damages are less than twenty dollars. *Goddard v. Davis*, 33.
3. This Court has not jurisdiction of an attachment for a less sum than twenty dollars, in Alexandria. *Rutter v. Merchant*, 36.
4. This Court has jurisdiction although the debt be reduced by offset, to less than twenty dollars. *McKnight v. Ramsay*, 40.
5. A plea to the jurisdiction is a good plea in bar after an office judgment. *Smith v. McCleod*, 43.
6. This Court has jurisdiction of prosecutions for gaming under the law of Virginia although that law directs the prosecution to be had before a justice of the peace. *United States v. Heinegan*, 50.
7. An offence against the Commonwealth of Virginia, committed in Alexandria before the first Monday of December, 1800, may be presented in this court as an offence against the United States. *Ibid.*
8. An inhabitant of Alexandria county may be arrested in Washington county without a return of *non est* in Alexandria county. *Thompson v. Lacy*, 79.
9. Two separate causes of action, amounting, together, to more than twenty dollars, if joined in one declaration, will give this court jurisdiction, although neither amounts to twenty dollars. *Ridgway v. Pancost*, 88.
10. This court has no jurisdiction to try a slave for larceny; but will quash the indictment and send him to a justice of the peace to be tried. By consent of parties the Court will try the issue whether slave or not. *United States v. Negro Jack*, 44; *United States v. Louder*, 103.
11. If the verdict in assumpsit, be for less than twenty dollars, a nonsuit must be entered. *Currey v. Fletcher*, 113.
12. This Court has jurisdiction, in Alexandria, to require the father of a bastard child to give security for its support. *Ross v. Kingston*, 140.
13. If the verdict be reduced below twenty dollars, by accounts in bar, there must be judgment of *non pros*. *Beale v. Voss*, 179; *McLaughlin v. Stelle*, 483.

JURISDICTION, (*Continued.*)

14. The mayor of Washington cannot exercise jurisdiction in a case in which he is a party. *Barney v. Corporation of Washington*, 248.
15. In Alexandria, the Court has jurisdiction in an action of debt upon a promissory note for two hundred and fourteen dollars, although the amount due upon it should be reduced by payments indorsed upon it, before suit brought, to eight dollars and ninety-four cents. *Hays v. Bell et al.* 440.
16. The Court, in Alexandria, has jurisdiction to discharge an apprentice for cruelty of the master, and to bind him out to another master. *Cannon v. Davis*, 457.
17. In an action of debt upon a sealed note, if the verdict be reduced below twenty dollars, by payments proved at the trial, judgment must be as in cases of *non pros*. *Smith v. Queen*, 483.
18. If a mortal stroke be given in Alexandria, and the death happen in Maryland, this Court has not jurisdiction of the offence as a homicide; but has jurisdiction of the assault and battery. *United States v. Bladen*, 548.
19. This Court has jurisdiction to quash an inquisition taken under the charter of the Georgetown and Alexandria Turnpike Company. *Georgetown and Alexandria Turnpike Co. v. Custis*, 585.
20. This Court has jurisdiction in cases of bastardy under the Maryland Act of 1781, c. 13, and may order the defendant to give security to indemnify the county. *United States v. Collins*, 592.
21. A justice of the peace, only, can make the order for payment of £30 a year by the father of a bastard under the Maryland Act of 1796, c. 34. *Ibid.*

JURY.

1. The Court will not, in a criminal prosecution, permit counsel to argue a point of law to the jury which has been decided by the court in a previous cause. *United States v. Cotton*, 55; *Commonwealth v. Zimmerman*, 47.
2. When a jury returns into Court to reexamine a witness, neither party will be permitted to ask any question of the witness, nor to make any motion to the court in the presence of the jury. *Ibid.*
3. Peremptory challenge is allowed in capital cases only, in Alexandria. *United States v. Carrigo*, 49.
4. When the penalty is fixed by law, the fine is not to be assessed by the jury. *United States v. Heinegan*, 50.
5. The Court is not bound, at the request of either party, to instruct the jury after they have retired unless the jury themselves request instruction. *Forrest v. Hanson*, 63.
6. Clerks in the public offices will not be compelled to serve as jurors. 130; *General Rule*, 147.
7. A juror, in Washington county, cannot be permitted to affirm, instead of taking the usual oath, unless he be one of those people who hold it unlawful to take an oath on any occasion. *Wilson Bryan's case*, 151; *Samuel McIntire's case*, 157.
8. A juror may be sworn with uplifted hand instead of touching the evangelists. *Ibid.*
9. Jurors escaping from their room may be fined for their contempt. *Offutt v. Parrott*, 154.
10. Upon an indictment for a riot at common law, in Alexandria county, the term of imprisonment is not to be assessed by the jury. *United States v. McFarlane et al.* 163.
11. After the jury has returned into court to give their verdict, the court will not permit a witness to be examined who has come into court since the jury retired. *Riley v. Cooper*, 166.
12. Upon a conviction for disturbing a religious congregation in Alexandria, the punishment is fine and imprisonment, to be assessed by the jury. *United States v. Aubrey*, 185.
13. An alien cannot be a petit juror. *United States v. Johnston*, 237.
14. The qualifications of jurors in Alexandria county are the same as in the county courts of Virginia. *Young v. Marine Ins. Co.* 238.
15. Affidavits of jurymen will not be received to show miscalculation, or mistake, or misconduct of the jurors, in giving their verdict. *Ladd v. Wilson*, 305.
16. In all cases of felony, in Alexandria county, the prisoner is entitled to a peremptory challenge. *United States v. Browning*, 330.

JURY, (*Continued.*)

17. The Court will not ask a juror, before he is sworn, whether he has formed and delivered any opinion in the case, but leave the party to his challenge for favor. *United States v. Johnson*, 371.
18. Upon an indictment for burglary, the jury may find the prisoner guilty of larceny only. *United States v. Dixon*, 414.
19. In an action against an insurance company, a nephew of a stockholder is not a competent juror. *Young v. Marine Ins. Co.* 452.
20. It is not a principal cause of challenge that the juror has had conversations with some of the parties; but it is evidence for the consideration of the triors, upon a challenge for favor. *Ibid.*
21. The Court will not permit the jury to be polled, unless some reason be assigned therefor. *Dunlop v. Munroe*, 536.
22. See Larceny, 15. No peremptory challenge, in larceny in Washington. *United States v. McPherson*, 517.
23. The Court will not instruct the jury upon a point not material to the issue. *Harper v. Smith*, 495.
24. Citizens of Alexandria are not competent jurors in an action of debt for the penalty of a by-law of the corporation; but are competent witnesses. *Common Council of Alexandria v. Brockett*, 505.
25. The two jurors first sworn in the cause are the proper triors of a challenge for favor. *Joice v. Alexander*, 528.
26. The Court will not permit counsel to argue to the triors upon a challenge for favor. *Ibid.*
27. The challenged juror cannot be examined as a witness to the triors. *Ibid.*
28. Information given by one juror to the others after they have retired, is not sufficient ground for a new trial, if the verdict has done substantial justice between the parties. *Cherry v. Sweeny*, 530.
29. The Court will not lend an easy ear to affidavits of jurors as to their proceedings after they have retired to consider of their verdict. *Ibid.*
30. Misbehavior of jurors is not a ground for new trial if it has not affected their verdict. *Henry v. Ricketts*, 545.
31. If a juror, in a civil cause, be taken suddenly ill, the jury may be discharged and the trial of the cause postponed till the next term. *Young v. Marine Ins. Co.* 566.

JUSTICE OF THE PEACE.

1. A justice of the peace, in the District of Columbia, is not an officer, judicial or executive of the government of the United States. *Wise v. Withers*, 262.
2. An authority which may be exercised by an individual magistrate, may be exercised by many, jointly. *Ex parte Burford*, 276.
3. A justice of the peace cannot discharge a prisoner who has been committed for trial for felony; nor can he take money in lieu of bail; but is not liable criminally unless he acted with evil intent. *United States v. Faw*, 486.

LANDS.

1. One half the real estate of a testator in Virginia is liable for his debts although not charged by his will. *Quære. Prime v. McRea*, 201.
2. By the laws of Virginia, in 1801, a court of equity could decree a sale of one moiety of the fee-simple of the deceased debtor's lands in the hands of his heir at law. *Id.* 294.

LARCENY.

1. This Court has not jurisdiction of larceny by a slave in Washington county. *United States v. Negro Jack*, 44.
2. On a trial for larceny of the goods of T. L., evidence that they were the property of a deceased person, in the possession and management of T. L. will support the indictment. *United States v. Barlow*, 94.
3. This Court has no jurisdiction of larceny by a slave, and will quash the indictment and send the slave to a justice of the peace to be tried. By consent of parties the Court will try the issue whether slave, or not. *United States v. Louder*, 103.
4. Upon indictment for stealing a check upon a bank it is not necessary to produce the check itself in order to permit parol evidence that it was presented at the bank. *United States v. Wilson*, 104.

LARCENY, (*Continued.*)

5. A slave may be tried for larceny in this Court sitting in Alexandria. *United States v. Betty Wright*, 123.
6. *Quære*, whether stealing a bank-note is larceny within the Act of Congress, of April 30, 1790, § 16. *United States v. Murray*, 141.
7. In larceny the owner of the stolen goods is a competent witness for the United States, after releasing to them all his interest in the fine. *United States v. McCann and Dulany*, 207; *United States v. Scipio Brown*, 210.
8. If goods be stolen in Maryland and brought by the thief into this district, he may be convicted and punished here. *United States v. Frank Tolson*, 269.
9. It is not felony to steal rails inserted into posts fixed in the ground, if severed and taken away at one time. *United States v. Wagner*, 314.
10. If a statute makes it felony to steal the notes of any incorporated bank, the statute, by which that bank was incorporated, thereby becomes a public statute. *United States v. Porte*, 369.
11. An indictment upon the Maryland Act 1793, c. 35, must state of what bank the stolen notes were, and whether the bank was incorporated by the United States, or by any particular State: It is not sufficient to make the averment in the terms of the act. *Ibid.*
12. Stealing wood, in collusion with the owner's slave, is larceny. *United States v. Walker*, 402.
13. The owner of goods stolen by a slave, in Alexandria, is not a competent witness for the prosecution, because he is entitled to one half of the fine which the court must impose under the Act of Congress. *United States v. Milly Rhodes*, 447.
14. Logs in a fence are not the subject of larceny, the fence being by law annexed to the freehold. *United States v. Smith*, 475.
15. Peremptory challenge is not allowed in cases of larceny in Washington county. *United States v. McPherson*, 517.

LEASE.

A lease for ninety-nine years, not acknowledged and recorded, is not good for seven years, but is evidence of the rate of rent in an action for use and occupation. *Brohawn v. Van Ness*, 366.

LEGACY.

A bequest of a slave gives no title until assented to by the executor. *Lee v. Ramsay*, 435.

LESSOR.

If the assignee of the lessee bind himself to the lessee to pay the rent to the lessor, the lessor may maintain an action of debt, against the assignee, for the rent; although the assignment should not be acknowledged, or proved, and recorded agreeably to the Virginia Act of 13th December, 1792, for regulating conveyances. *Cooke v. Myers*, 6.

LIBEL.

1. Comparison of handwriting is evidence to prove the publication of a libel. *Brooke v. Peyton*, 96.
2. It is a libel to print and publish these words, "he is a lying slanderous rascal;" and it is no justification that the plaintiff had stated what was not true unless he had stated it maliciously. *Snowdon v. Lindo*, 569.

LIMITATION.

1. The statute of limitations cannot be given in evidence upon the general issue. *Neale v. Walker*, 57; *Gardner v. Lindo*, 78; *McIver v. Moore*, 90.
2. After office judgment, the court will not receive a plea of limitations, nor upon reinstatement after *non pros*; unless upon affidavit of merits. *Ibid.*; *Smith v. Stoops*, 238.
3. The statute of limitations does not apply to accounts between merchants. *Wilson v. Mandeville et al.* 433, 452.
4. After judgment for the plaintiff upon demurrer to the replication to the plea of limitations, the Court will not permit the defendant to withdraw the demurrer and rejoin specially, unless he can show by affidavit that it is necessary to the justice of the case. *Ibid.*

LIMITATION; (*Continued.*)

5. *Non assumpsit infra tres annos*, is not a good plea to an action upon a promissory note payable thirty days after date. *Ferris v. Williams*, 475.
6. The State of Delaware is beyond seas, in regard to the District of Columbia, within the meaning of the statute of limitations. *Ibid.*
7. The Act of Congress of 30th of April, 1790, § 32, which limits the prosecution of offences not capital, to two years, applies to cases of assault and battery at common law in the District of Columbia. *United States v. Slacum*, 485.
8. In actions against executors the statute of limitations may be pleaded after office judgment. *Wilson v. Turberville's Executors*, 492.
9. A clause in a will, directing the testator's debts to be paid out of the rents of his real estate, does not take the case out of the statute of limitations, if the plaintiff does not seek his remedy under the will. *Id.* 512.
10. A British subject who took a bond from his debtor, payable to a citizen of the United States, cannot avoid the statute of limitations under the clause of the treaty removing all legal impediments, &c. *Auld v. Hoyer*, 544.
11. The Court will not permit the statute of limitations to be pleaded, to an action of trespass for *mesne profits*, after the rule-day, but upon payment of all antecedent costs, and continuance of the cause. *Marsteller v. M'Clean*, 550.
12. If the holder of an accepted bill of exchange be beyond seas at the time his cause of action accrues, and so continues until suit brought, the statute of limitations is no bar, although the indorser was always a resident of the United States. *Irving v. Sutton*, 567.
13. The disability of one joint plaintiff does not take the case out of the statute of limitations. *Marsteller v. M'Clean*, 579.

MALICIOUS PROSECUTION.

In an action upon the case for a malicious prosecution, the defendant may, upon the general issue, show probable cause for the prosecution. *Sheehy v. Resler*, 42.

MANDAMUS.

If the right of the party applying for a *mandamus* be not clear, or if he has an adequate legal remedy, the court will not grant the *mandamus*. *Marine Ins. Co. v. Bank of Alexandria*, 7.

MANSLAUGHTER.

1. In manslaughter a peremptory challenge is allowed, in Virginia. *United States v. McLaughlin*, 444.
2. Upon a conviction of manslaughter at common law the court will give judgment of fine and imprisonment under the Act of Congress of the 30th of April, 1790, § 7. *Ibid.*

MANUMISSION.

1. A sale of a slave upon the express condition that he should be free at the end of six years is not a manumission under the Maryland Act of 1796, c. 67. *Fidelio v. Dermott*, 405.
2. A manumission by will is not in prejudice of creditors, if the real and personal estate are sufficient, without the value of the manumitted slave, to pay all the debts of the testator. *Ibid.*
3. A manumission by will, after a term of years, is not revoked by a codicil ordering the sale of all the testator's slaves, if, at the time of making the codicil, their term of service had not expired. *Ibid.*

MARRIAGE.

An indictment against a minister for joining in marriage persons under age, without the consent of their parents or guardians, contrary to the Act of Maryland, 1777, c. 12, § 9, must aver that the defendant was, at the time of solemnizing the marriage, a minister authorized and qualified to celebrate the rite of matrimony; it must also, if it contain an averment that it was done without the consent of the parents, aver that there was a parent then living, and that there was no guardian who could consent, or that it was without the consent of the guardian, as well as without the consent of the parents. *United States v. McCormick*, 593.

MARSHAL.

1. The marshal is entitled to a fee of ninety pounds of tobacco for impanelling a jury in a criminal prosecution. *United States v. McDonald*, 78.

MARSHAL, (Continued.)

2. The marshal's commission of five per cent. may be included in the replevin bond for rent. *Alexander v. Thomas*, 92.
3. The marshal may include his commissions in a forthcoming bond; and is also entitled to his commissions upon an execution on the bond. *Thomas v. Brent*, 161.
4. If the plaintiff has received the debt and costs, the marshal cannot detain the defendant, upon a *ca. sa.* for his poundage. *Causin v. Chubb*, 267.
5. An attachment from this Court for a witness in Virginia, is to be served and returned by the marshal of Virginia. *Voss v. Luke*, 331.
6. The Court will not order the defendant's appearance to be struck out so as to charge the marshal. *Wood v. Dixon*, 401.
7. The marshal is entitled to a fee of \$5.50 for summoning and impanelling a coroner's inquest, in the county of Alexandria. *Brent v. Justices of the Peace*, 434.
8. A prison-bonds bond may be assigned by a deputy-marshal, in Alexandria county. *Scott v. Wise*, 473.
9. The marshal is liable if he suffers a debtor in execution to escape, although the debtor returns into custody, and the marshal has him at the return of the *ca. sa.* *United States v. Brent*, 525.

MASTER AND SERVANT.

A servant selling liquor for his master without license, is not liable to the penalty. *United States v. Paxton*, 44.

MASTER OF A VESSEL.

A master of a vessel is not liable to the penalty of the Act of Virginia for carrying a slave out of the Commonwealth unless he did it knowingly. *McCall v. Eve*, 188.

MILITIA.

1. A justice of the peace of the District of Columbia is not an officer, judicial or executive, of the government of the United States, and is liable to militia duty. *Wise v. Withers*, 262.
2. Judgment, upon ten days' notice, cannot be given upon the bond of a collector of militia fines. *Enoch Spaulding's Case*, 387.

MISDEMEANOR.

1. The want of the name of a prosecutor at the foot of the indictment for a misdemeanor is no ground for arresting the judgment. *United States v. Jamesson*, 62.
2. A *capias* is proper process upon an indictment for misdemeanor. *Ibid.*
3. The name of a prosecutor must be written at the foot of an indictment for keeping a bawdy-house. *United States v. Mary Rawlinson*, 83.
4. Misdemeanors, in Alexandria county, not to be tried until the term next after that to which the *capias* shall have been returned executed. *General Rule*, 122.
5. Upon a conviction for disturbing a religious congregation, in Alexandria county, the punishment is fine and imprisonment to be assessed by the jury. *United States v. Aubrey*, 185.
6. It is no ground of general demurrer to an indictment for misdemeanor under the laws of Virginia of 1792 and 1795, that the name of a prosecutor is not written at the foot of the indictment. *United States v. Sandford*, 323.
7. Upon a recognizance for the appearance of the defendant in a case of misdemeanor, he is bound to appear on the first day of the term. *United States v. Hodgkin*, 510.

MISNOMER.

After plea of misnomer in abatement, the Court will not suffer the record to be amended, but upon the payment of costs and a discharge of the bail. *Payen v. Hodgson*, 508.

MISTAKE.

1. The acceptor of a bill of exchange given for the amount of an award, cannot avail himself of a mistake of the arbitrators in making up their award. *Miller v. Butler*, 470.

MISTAKE, (Continued.)

2. A purchaser of a vessel, who has paid the expenses and disbursements of a previous voyage, upon the order of the master, cannot recover them from the master, although he paid them under a mistaken expectation that he was to be reimbursed out of the freight. *Hodgson v. Butts*, 488.

MONEY.

1. Judgment for sterling money. Irish sterling. *Bond v. Grace*, 96.
2. Upon a deed made in 1779, reserving an annual rent of £26 current money of Virginia forever, the rents accruing during the existence of paper money, are to be reduced according to the scale of depreciation. *Marsteller v. Faw*, 117.
3. The delivery of counterfeit money by the defendant to a person, to be passed off generally, for the benefit of the defendant, is not a passing "in payment" within the Virginia Act of 19th December, 1792. *United States v. Venable*, 416.

MURDER.

- Dying declarations are evidence. *United States v. McGurk*, 71.

NATURALIZATION.

1. A deposition in 1802 that the deponents have known the applicant "since the year 1793 in New York," is not evidence that he was residing in the United States before the 29th of January, 1795. *Ex parte Tucker*, 89.
2. Five years continued residence was necessary under the Act of April, 1802. *Ex parte Walton*, 186; *Ex parte Saunderson*, 219.
3. A foreign mariner, residing in Alexandria five years, but occasionally during that time, sailing from that port in American vessels, may be naturalized. *Ex parte Pasquall*, 243.
4. A *feme covert* may be naturalized. *Marianne Pic's case*, 372.

NE EXEAT.

1. If the sureties of an administratrix reside out of the district, a *ne exeat* will be granted to restrain her from moving away with the goods of the deceased before final settlement of her administration account; but it will not be granted against her sureties. *Patterson v. McLaughlin et al.* 352.
2. A *ne exeat* will not lie, in Alexandria county, to restrain a garnishee from going out of the District of Columbia. *Patterson v. Bowie et al.* 425.

NEGRO.

1. A free negro is a competent witness against a free white man. *Quære. United States v. Fisher*, 244.
2. Free born negroes, not subject to any term of servitude by law, are competent witnesses in all cases. Color alone is no objection to a witness. *United States v. Mullany*, 517.
3. A slave is not a competent witness against a free born mulatto, not subject to any term of servitude by law. *United States v. Peggy Hill*, 521.
4. The affidavit of a manumitted negro is sufficient ground for an order to issue a summons returnable immediately, upon a petition for freedom. *Negro Nan v. Moxley*, 523.

NEW TRIAL.

1. Misbehavior of jurors is not a ground for a new trial, if it has not affected the verdict. *Henry v. Ricketts et al.* 545.
2. The refusal of a new trial is not error. *Ibid.*
3. A new trial will not be granted on affidavit that the plaintiff has since discovered testimony to discredit a witness who was examined at the trial, if that witness was not the only witness to the point on which he testified. *Brooke v. Peyton*, 128.
4. A new trial will not be granted because the verdict is against the weight of evidence, if substantial justice has been done. *Johnston v. Harris*, 257.
5. Information given by one juror to the others, after they have retired, is not sufficient ground for a new trial if the verdict has done substantial justice between the parties. *Cherry v. Sweeny*, 530.
6. The Court will not lend an easy ear to affidavits of jurors as to their proceedings after they have retired. *Ibid.*

NOTICE.

1. One hour's notice to the attorney at law of the opposite party, of the time and place of taking a deposition, where the party lives in the same village or town, is reasonable, unless special circumstances should render it unreasonable. *Leiper v. Bickley*, 29.
2. The affidavit of service of notice by leaving it with the defendant's wife, need not state that she was informed of the purport of the notice. *McCall v. Towers*, 41.
3. Notices given to the attorney at law, of a motion for a *dedimus*, is sufficient. *Potts v. Skinner*, 57.
4. An hour's notice of taking a deposition, in Alexandria, is sufficient. *Nicholls v. White*, 58.
5. Where there are two joint indorsers, notice must be given to both. *Gantt v. Jones*, 210.
6. Notice to the indorser is necessary, unless he knew that the maker was insolvent at the time of his indorsement. *Morris v. Gardner*, 213.
7. Where the parties live within two miles of each other, nine days' delay is fatal. *Ibid.*
8. Reasonableness of notice is to be left to the jury. *Cox v. Simms*, 238.
9. One day's notice, to the attorney at law, is sufficient to take the deposition of a seafaring man, under the Maryland law of 1721, c. 14, § 3, but it cannot be read unless the witness has gone from the district. *Bowie v. Talbot*, 247.
10. The Court, at an adjourned session, will hear a motion to dissolve an injunction, upon notice given after the first session of the term. *Burford v. Ringgold*, 253.
11. Notice of motion to dissolve injunction given on the first day of the term, is notice that the motion is to be made at the next succeeding term. *Ramsay v. Wilson*, 304.
12. It is necessary that the holder of a foreign bill of exchange, protested for non-acceptance, should give notice of the protest as soon as possible under all the circumstances, according to the usual course of communication. *Lindenberger v. Wilson*, 340.
13. Under the Virginia laws respecting the taking of depositions, notice to the attorney at law is not sufficient. *Wheaton v. Love*, 429.
14. In an action against a surety in a bond to perform a decree, it is not necessary that notice of the decree should have been given to the principal. *White v. Swift*, 442.
15. Notice to produce a book of accounts, given on the preceding evening, is sufficient when the counting-house of the party is near the court-house. *Shreve v. Dulany*, 499.
16. In time of war duplicate notices of protest of a bill of exchange should be sent. *Phillips v. Janney*, 502.
17. Two hours' notice of taking a deposition in Alexandria, where all the parties resided, was too short. *Jamieson v. Willis*, 566.
18. Notice of a motion for a *dedimus* to take depositions in a foreign country, may be given to the attorney at law. *Irving v. Sutton*, 575.

NUISANCE.

A public gaming-house is a common nuisance at common law. *United States v. Ismenard*, 150.

OATH.

1. A juror cannot be permitted to affirm instead of taking the usual oath, unless he is one of those people who hold it unlawful to take an oath on any occasion. *Wilson Bryan's case*, 151.
2. A juror may be sworn with uplifted hand, instead of touching the Evangelists. *Ibid.*
3. The oath required by the Virginia law of 17th December, 1792, § 4, is of no avail unless taken within sixty days after the removal of the party. *Lucey v. Slade*, 422.
4. A warrant of commitment should state probable cause supported by oath or affirmation. *Ex parte Burford*, 276.

OFFICE JUDGMENT.

1. A special demurrer will not be admitted to set aside an office judgment. *Whetcroft v. Dunlop*, 5.

OFFICE JUDGMENT, (*Continued.*)

2. Special bail will not be required on setting aside an office judgment, unless appearance-bail was required. *Shean v. Towers*, 5.
3. A plea to the jurisdiction is a good plea in bar after an office judgment. *Smith v. McCleod*, 43.
4. An office judgment may be set aside on the plea of "never executrix." *Alexander v. West*, 88.
5. Upon a motion to set aside an office judgment upon an injunction bond, the court will not suffer the defendant to plead that the obligee was dead at the time of the execution of the bond. *Porter v. Marsteller*, 129.
6. Office judgments, rendered between the original session and an adjourned session of a term cannot be set aside at the adjourned session. *Memorandum*, 159.
7. When the office judgment is set aside by the defendant the plaintiff may have the cause continued at the defendant's costs. *McCulloch v. Debutts*, 285.
8. In an action upon an auctioneer's bond, for not paying over to A and B money received for sales at auction; a rejoinder that it had not been established, by a judgment, that money was due to them by the auctioneer, is an issuable plea to set aside an office judgment. *Mayor & Com. of Alexandria v. Moore*, 440.

OFFICERS.

1. Officers of the court cannot be bail without the leave of the court. *General Rule*, 246.
2. A justice of the peace in the District of Columbia, is not an officer of the United States, and therefore not exempt from militia duty. *Wise v. Withers*, 262.
3. It is not necessary that a peace-officer should have a warrant, to justify him in suppressing an affray. *United States v. Pignel*, 310.
4. It is to be presumed that a sworn officer has discharged his duty faithfully. *Dunlop v. Munroe*, 536.
5. A constable, having a warrant to arrest a man for assault and battery, has a right to break open the door of the offender's dwelling-house to arrest him. *United States v. Faw*, 487.

ORPHANS' COURT.

1. The register of the Orphans' Court, in Alexandria, is entitled to the custody of the record books of wills, of the late Court of Hustings. *United States v. Deneale*, 34.
2. The Orphans' Court of Alexandria county, cannot in any case, grant letters testamentary without security, unless the testator's personal estate is sufficient to pay all his debts. *Ex parte E. J. Lee Ex'r of Craik*, 394.
3. Upon attachment from the Orphans' Court, for contempt in not appearing to answer, &c., the marshal cannot detain the party after the return-day of the attachment, unless by an order of commitment by that court. *Ex parte Burford*, 456.

OYER.

1. Oyer of the record of a judgment of a state court will not be given unless prayed before the expiration of the rule to plead. *Cull v. Allen*, 45.
2. After plea, replication, rejoinder and special demurrer, the defendant is not entitled to oyer of the plaintiff's letters of administration, nor to plead that the plaintiff is not administrator. *Grahame v. Cooke*, 116.
3. Although the plaintiffs name themselves administrators yet if they have not made *profert* of their letters of administration, they are not bound to give oyer of them. *Mason's Adm'rs v. Lawrason et al.* 190.
4. After oyer prayed and demurrer by the defendant, the plaintiff is not bound to give oyer at a subsequent term. *Offutt v. Beatty*, 213.

PARCENERS.

1. If one of four parceners be an alien, the land descends to the other three. *Contee v. Godfrey*, 479.
2. A decree of partition does not pass any thing from one coparcener to another. *Ibid.*

PARTITION.

1. A decree of partition between heirs, some of whom are aliens, does not estop those, who were not aliens, from claiming the whole in ejectment. *Contee v. Godfrey*, 479.

PARTITION, (Continued.)

2. A decree of partition does not pass any thing from one coparcener to another. *Ibid.*

PARTNERSHIP.

1. In an action at law by one partner against another, the partnership book kept by the defendant is not evidence against the plaintiff, although it had been in his possession. *Sutton v. Mandeville*, 2.
2. If one of two joint partners or contractors is sued alone upon a joint contract, he must plead it in abatement, he cannot take advantage of it upon the general issue. *Clementson v. Beatty*, 178.
3. In *assumpsit* for goods sold and delivered, the defendant may prove a partnership between the plaintiff and the witness, by the witness. *Lovejoy v. Wilson*, 102.
4. In an action for goods sold by Tibbs & Co. the plaintiffs must prove themselves to be the firm of Tibbs & Co. *Tibbs et al. v. Parrott*, 313.
5. To support a plea in abatement for not naming all the joint promisors, it is not necessary for the defendant to prove that the plaintiff knew he was dealing with a copartnership. *Norwood v. Sutton*, 327.
6. If the goods sold belonged to a partnership at the time of sale the action must be brought in the name of all the partners, although the defendant was ignorant of the partnership. *Bennett v. Scott*, 339.
7. If the only resident member of a copartnership, who are plaintiffs, dies pending the suit, the defendant may demand security for costs. *Lambert v. Smith*, 347.
8. If all the members of a partnership are not named as plaintiffs, the defendant may avail himself of the objection upon *non assumpsit*. *Carne et al. v. McLane*, 351.
9. It is not incumbent upon joint plaintiffs to prove that they are joint partners. *Woodward et al. v. Sutton et al.* 351.
10. To prove a partnership, parol evidence cannot be given of the contents of printed cards; nor general reputation of partnership. *Wilson v. Colman et al.* 408.
11. Upon a joint shipment by three persons, the master is not liable to an action by two only, for breach of orders given by the three. *Young & Deblois v. Black*, 432.
12. After the dissolution of a partnership, one of the partners having authority to collect the debts, may transfer to himself a debt due to the firm. *Oxley v. Willis*, 436.
13. An action, under the Virginia law, may be maintained upon a promissory note against a secret partner who has not signed it. *Bank of Alexandria v. Mandeville*, 575.
14. The secret partner is not liable unless the money came to the use of the partnership. *Ibid.*
15. A creditor of a firm is a competent witness to prove its existence. *Ibid.*

PAYMENT.

1. The obligee's indorsement of a payment upon a bond is not evidence to rebut the presumption of payment, unless made with the privity of the obligor. *Kirkpatrick v. Langphier*, 85.
2. An order payable out of a particular fund, and not negotiable, is not payment of a preceding debt. *Governor of Virginia v. Turner's Sureties*, 261.
3. The receipt of the bond of a third person, "in part pay" of a precedent debt, is conclusive evidence of payment to that extent, although the obligor was insolvent when the receipt was given. *Muir v. Geiger*, 323.
4. A creditor may resort to his collateral security, although he has taken and discharged the bail of his principal debtor upon a *ca. sa.* *Hartshorne v. McIver*, 421.

PENALTY.

If a statute prescribes a particular mode of recovering a penalty, it must be pursued. *United States v. Ellis*, 125.

PERJURY.

Perjury may be punished by fine, imprisonment, and pillory. *United States v. Snow*, 123.

PILLORY.

Perjury may be punished by pillory. *United States v. Snow*, 123.

PLATS.

In ejectment the plats are part of the pleadings; in trespass they are evidence only. *Pancoast v. Barry*, 176.

PLEADING.

1. In trespass the defendant cannot justify under the general issue. *Goddard v. Davis*, 33.
2. A plea to the jurisdiction is a good plea in bar after an office judgment. *Smith v. McCleod*, 43.
3. The Court will give the defendant time to plead after *oyer*. *Calvert v. Slater*, 44.
4. *Oyer* of the record of the judgment of a State court will not be given unless prayed before the expiration of the rule to plead. *Cull v. Allen*, 45.
5. The plaintiff, in slander, may have leave to withdraw his general replication and file a general demurrer; and the Court will give the defendant leave to change his plea. *McGill v. Sheehy*, 49.
6. The Court will not permit a plea to the merits to be withdrawn to enable the defendant to demur specially. *Alricks v. Slater*, 72.
7. In an action of slander, if it appear from the plaintiff's evidence that, at the time of speaking the words, the defendant named his author, who was a responsible man, the defendant may avail himself of that evidence, without pleading that matter as a special justification. *Hogan v. Brown*, 75.
8. Leave to amend by substituting a general demurrer for the general issue. *Krouse v. Sprogell*, 78.
9. The act of limitation cannot be given in evidence upon *nil debet*. *Gardner v. Lindo*, 78.
10. Debt will lie against the maker of a promissory note. *Ibid*.
11. After verdict it is too late to object the want of *profert*; or that the action is in the *debet* and *detinet*. *Ibid*.
12. An office judgment may be set aside upon the plea of "never executrix." *Alexander v. West*, 88.
13. After plea, replication, rejoinder, and special demurrer, the defendant is not entitled to *oyer* of the plaintiff's letters of administration, nor to plead that the plaintiff is not administrator. *Grahame v. Cooke*, 116.
14. In assault and battery, on the plea of not guilty, the plaintiff is not bound to prove that the defendant struck or assaulted him first; but upon the plea of *son assault demesne*, the defendant must prove that the plaintiff first assaulted him. *Stevens v. Lloyd*, 124.
15. If, in an action upon a bond with collateral condition, the entry of the pleadings be, "covenants performed—joined," the Court will send the cause back to the rules, as not being at issue. *Mayor and Com. of Alexandria v. Bowne*, 124.
16. After not guilty and issue to an action of debt on a judgment in Virginia suggesting a *devastavit*, the Court will not suffer the defendant to plead *nul tiel record*, without showing sufficient cause for not pleading it before. *Bastable v. Wilson*, 124.
17. *Nil debet* is not a proper plea here to an action of debt upon a judgment of a State court. *Ibid*.
18. The court will not suffer the general issue to be withdrawn to enable the defendant to plead in abatement. *Bank of Columbia v. Scott*, 134.
19. To an action of covenant for rent the defendant cannot plead that his lessor had not paid the ground-rent according to his covenant. *Gill v. Patton*, 143.
20. If there be a special contract the plaintiff cannot recover upon a general count. *Rambler v. Choat*, 167.
21. In ejectment, the plats are a part of the pleadings; in trespass, they are evidence only. *Pancoast v. Barry*, 176.
22. In trespass *quare clausum fregit*, upon "not guilty" pleaded, with notice of "defence on warrant," the defendant may give his title in evidence as a justification, without pleading it specially. *Ibid*.
23. If one of two joint partners, or contractors, is sued alone upon a joint contract, he must plead it in abatement; he cannot take advantage of it upon the general issue. *Clementson v. Beatty*, 178.
24. The declaration need not state by whom the letters testamentary were granted. *Cawood v. Nichols*, 180.

PLEADING, (*Continued.*)

25. Although the plaintiffs name themselves administrators, yet, if they have not made *profert* of their letters of administration, they are not bound to give oyer of them. *Mason's Adm'r v. Lawrason et al.* 190.
26. After judgment for the plaintiff on the defendant's demurrer, and writ of inquiry awarded, the court will not permit the defendant to plead *de novo*, without withdrawing his demurrer. *Woodrow v. Coleman*, 192.
27. An executor may be ruled to plead before the expiration of the year after letters granted. *Frazier v. Brackenridge*, 203.
28. After oyer prayed, and demurrer by the defendant, the plaintiff is not bound to give oyer at any subsequent term. *Offutt v. Beatty*, 213.
29. The court will not give leave to amend a demurrer unless it goes to the merits. *Ibid.*
30. In debt the declaration must be for a sum certain. *Ashton v. Fitzhugh*, 218.
31. After office judgment the court will not receive a plea of limitations. *Smith v. Stoops*, 238.
32. A plea of the pendency of a former suit, in another court, must offer to produce the record of such suit. *Riddle v. Potter*, 288.
33. If the jury find for the plaintiff on the plea of *plene administravit*, he shall have judgment, *de bonis testatoris*, for his whole debt. *Fairfax v. Fairfax*, 292.
34. To set aside an office judgment the Court will not suffer the defendant to plead specially, what may be given in evidence upon the general issue. *Vowell v. Lyles*, 329.
35. Outstanding judgments cannot be given in evidence on *plene administravit*, but must be specially pleaded. *Hines v. Craig*, 340.
36. Upon the plea of "performance" the plaintiff is not bound to produce the original covenant. *Beall v. Newton*, 404.
37. The general issue upon a petition for freedom is that which puts in issue the simple question, whether free or not. *Negro Ben v. Scott*, 407.
38. If the principal comes in and gives special bail, and sets aside the plea pleaded by the appearance bail, the plaintiff is entitled to a continuance of the cause. *Wise v. Groverman*, 418.
39. A special demurrer brings into question the substantial validity of the pleading of the demurring party. *Vowell v. Lyles*, 428.
40. In an action upon an auctioneer's bond for not paying over to A and B money received for sales at auction, a rejoinder that it had not been established by a judgment that money was due to them by the auctioneer, is an issuable plea to set aside an office judgment. *Mayor and Com. of Alexandria v. Moore*, 440.
41. The Court will permit the defendant to withdraw the general issue and file a general demurrer. *Deakins v. Lee*, 442.
42. Counts, charging the defendants as executors upon the promise of their testator, and upon their own promise as executors in consideration of assets, may be joined in the same declaration, and the judgment upon each count will be *de bonis testatoris*. *Dixon v. Ramsay*, 472.
43. A declaration against "the common council of Alexandria" for work and labor done for "the mayor and commonalty" must show how the new corporation is liable for the debts of the old. *Lyles v. Common Council of Alexandria*, 473.
44. *Non assumpsit infra tres annos* is not a good plea to an action upon a promissory note payable thirty days after its date. *Ferris v. Williams*, 475.
45. The day stated in a declaration upon an account is not material. *McLaughlin v. Turner*, 476.
46. The discharge of the principal under the insolvent act before the return of the *ca. sa.* may be pleaded in bar to a *scire facias* against the bail. *Byrne v. Carpenter*, 481.
47. An averment that the defendant neglected to send forward a letter "as it was his duty to do," is only an allegation that the defendant was bound to send it by the next mail; not that he did not send it by the next mail. *Dunlop v. Munroe*, 536.
48. A count charging the loss to have been by the misfeasance of the defendant or some other person employed by him, is not bad upon general demurrer. *Ibid.*
49. When a plea is pleaded to certain enumerated counts, the plaintiff may reply to it specially as it applies to some of the counts, and demur to it as it applies to other counts. *Ibid.*

PLEADING, (*Continued.*)

50. After a plea of general performance, a rejoinder, stating an excuse for not performing is bad. *McGowan v. Caldwell*, 481.
51. In actions against executors, the statute of limitations may be pleaded after office judgment. *Wilson v. Turberville's Executors*, 492.
52. Upon *certiorari* in "forcible entry and detainer," no pleas will be allowed but a traverse of the force, or a possession for three years. *United States v. Browning*, 500.
53. A former recovery may be given in evidence upon *nil debet*. *Welsh v. Lindo*, 508.
54. A former recovery upon a count for goods sold and delivered may be given in evidence in an action of debt upon a promissory note, with an averment that judgment was confessed, in the former action, upon and for the note now declared upon. *Ibid.*
55. A copy will not be received as over when a *profert* has been made of the original; and if a copy is offered the defendant may demur. *Wellford v. Miller*, 514.
56. A count upon the indorsement of a promissory note, not payable to order, without averring a consideration for the indorsement, is bad in Virginia. *Janney v. Geiger et al.* 547.
57. A plea that the maker of the note had, at the date of the writ, goods and chattels to greater amount than the plaintiff's claim, is no answer to an averment of insolvency. *Ibid.*
58. The Court will not permit the defendant to tender an issue to which he had demurred when tendered by the plaintiff. *Hodgson v. Marine Ins. Co. of Alexandria*, 569.
59. After the rule to plead has expired, the court will not compel the plaintiff to produce his cause of action. *Bailey v. Sutton et al.* 551.
60. A declaration in trover for "a tool-chest containing divers tools and working utensils," and "a trunk containing clothes," is sufficiently certain. *Ball v. Patterson*, 607.

POSTMASTER.

1. The instructions of the Postmaster-General to the deputy-postmasters may be given in evidence in an action upon the case against a deputy-postmaster for negligence. *Dunlop v. Munroe*, 536.
2. A deputy-postmaster and his clerks are only bound to use such care and diligence, in the discharge of their duties, as a prudent man exercises in his own affairs. *Ibid.*
3. Deputy-postmasters are civilly liable for the acts of their servants and clerks; but the neglect of the servant or clerk cannot be given in evidence upon a count charging the loss to have been incurred by the neglect of the deputy postmaster himself. *Ibid.*
4. It is to be presumed, *primâ facie*, that a sworn officer has discharged his duty faithfully. *Ibid.*

PRACTICE.

1. Upon a writ of inquiry, in Virginia, the plaintiff's own oath may be received in evidence of the amount of the claim. *Mandeville v. Washington*, 4.
2. A special demurrer will not be admitted to set aside an office judgment. *Whetcroft v. Dunlop*, 5.
3. Special bail will not be required upon setting aside an office judgment, if appearance-bail was not required. *Shean v. Towers*, 5.
4. A defective forthcoming bond will, at the plaintiff's request, be quashed; as well as the execution upon which it was founded. *Sutton v. Mandeville*, 32.
5. It is not necessary to give notice of an application for an injunction. *Love v. Fendall's trustees*, 34.
6. A motion may be made against a sheriff in the name of the original plaintiff, although he has taken the insolvent oath. *Fendall v. Turner*, 35.
7. Bail will not be required in an action against an indorser by his immediate indorsee, while another action is pending against him by a remote indorsee. *Johnson v. Harris*, 35.
8. A motion to appear without bail will not be heard before the appearance-day, if the defendant be not in actual custody. *Olive v. Mandeville*, 38.

PRACTICE, (*Continued.*)

9. An attachment, issued upon return of "non est" before the appearance day, will be quashed. *Camilloz v. Johns*, 38.
10. A constable may be suspended from office upon affidavit without a rule to show cause. *Bowling's case*, 39.
11. Bail is not discharged by a discontinuance of the action at the rules, if it be reinstated. *Gadsby v. Miller*, 39.
12. It is no cause for arresting the judgment that the jury found the damages in pounds, when the damages in the declaration were laid in dollars. *Butts v. Shreve*, 40.
13. It is no cause for arresting the judgment that the debt is reduced by offsets below the original jurisdiction of the Court. *McKnight v. Ramsay*, 40.
14. The affidavit of service of notice by leaving it with the defendant's wife, need not state that she was informed of the purport of the notice. *McCall v. Towers*, 41.
15. In slander, bail is not required if the affidavit does not state the words spoken, and that the defendant is about to leave the district. *Lanstraaz v. Powers*, 42.
16. A plea to the jurisdiction is a good plea in bar after an office judgment. *Smith v. McLeod*, 43.
17. The Court will give the defendant time to plead after oyer. *Calvert v. Slater*, 44.
18. The Court, in Washington, may order an indictment to be sent to the grand jury with a previous presentment for the same offence. *United States v. Madden*, 45.
19. Oyer of the record of a judgment of a state court will not be given unless prayed before the expiration of the rule to plead. *Cull v. Allen*, 45.
20. The Court will not, in a criminal prosecution, permit counsel to argue a point of law, to the jury, which has been decided by the court in a previous cause. *Commonwealth v. Zimmerman*, 47.
21. When a jury returns into court to reëxamine a witness, neither party will be permitted to ask any question of the witness, nor to make any motion to the court in the presence of the jury. *Ibid.*
22. The plaintiff, in slander, may have leave to withdraw his general replication and file a general demurrer; and the court will give the defendant leave to change his plea. *McGill v. Sheehee*, 49.
23. After plea by appearance-bail, the defendant may give special bail and plead a new plea. *Pickett v. Lyle*, 49.
24. Security for costs may be given at any time before judgment on the rule. *Reverez v. Camellos*, 50.
25. Judgment will not be rendered on motion of one surety against another, unless the insolvency of the principal be fully proved. *White v. Perrin*, 50.
26. A *capias* may be issued, as the first process against a person for unlawful gaming. *United States v. Cotton*, 55.
27. The Court will not suffer counsel in a criminal prosecution, to argue, to the jury, a point of law which has been decided by the court. *Ibid.*
28. The Court will not interfere to prevent bail from seizing the principal, further than to keep order in court. *Smith v. Catlett*, 56.
29. An information may be amended. *United States v. Shuck*, 56.
30. Notice, given to the attorney at law, of a motion for a *dedimus*, is sufficient. *Potts v. Skinner*, 57.
31. The statute of limitations cannot be given in evidence upon the general issue. *Neale v. Walker*, 57.
32. One hour's notice of taking a deposition is sufficient. *Nicholls v. White*, 58.
33. The Court is not bound, at the request of either party, to instruct the jury, after they have retired, unless the jury themselves request instruction. *Forrest v. Hanson*, 63.
34. Upon calling the appearance docket, if the defendant offers to appear, the Court will not give the plaintiff's attorney time to procure an affidavit to hold the defendant to special bail. *Meade v. Roberts*, 72.
35. The Court will not permit a plea to the merits to be withdrawn to enable the defendant to demur specially. *Atricks v. Slater*, 72.
36. No civil cause is to be tried unless it has stood one term at issue. *Boyer v. Roberts*, 73.

PRACTICE, (*Continued.*)

37. The defendant will not be ruled to argue a demurrer at the term at which the demurrer shall be joined by him, although the rule to join in the demurrer shall have expired before the term. *Bowman v. French*, 74.
38. Leave to amend, on payment of the costs of the term, or a continuance, at the plaintiff's option. *Milburne v. Kearnes*, 77.
39. Leave to substitute a general demurrer, for the general issue. *Krouse v. Spragell*, 78.
40. An inhabitant of Alexandria county may be arrested in Washington county without a return of "*non est*" in Alexandria county. *Thompson v. Lacy*, 79.
41. It is no bar to an execution upon a *supersedeas* in Washington county, that the plaintiff has recovered another judgment in Alexandria county upon the same cause of action, if it be not satisfied. *Curry v. Lovell*, 80.
42. A *capias* is the proper process upon an indictment for misdemeanor found after service of a summons to show cause why an indictment or information should not be filed. *United States v. Veitch*, 81.
43. A prosecutor has no right to withdraw the prosecution without the consent of the Attorney for the United States. *Commonwealth v. Dulany*, 82.
44. Upon a trial for larceny, the owner of the stolen goods is a competent witness in chief, upon filing with the clerk of the Court for the use of the prisoner, a release of the witness's right to one half of the fine which the Court might impose. *United States v. Hare*, 82.
45. The name of a prosecutor must be written at the foot of the indictment for keeping a bawdy-house. *United States v. Mary Rawlinson*, 83.
46. An information may be discontinued before the defendant's appearance. *Commonwealth v. Eakin*, 83.
47. Judgment entered by mistake of the clerk may be set aside at the next term, and the execution quashed. *United States v. McKnight*, 84.
48. An instrument can be proved only by the subscribing witness, unless, &c. *Rhodes v. Rigg*, 87.
49. An office-judgment may be set aside upon the plea of "never executrix." *Alexander v. West*, 88.
50. No subpoena for attachment in chancery shall issue before bill filed. *General Rule*, 89.
51. Upon reinstatement after nonsuit, the Court will not admit the plea of limitation unless upon affidavit of merits. *McIver v. Moore*, 98.
52. A variance between the *capias* and the declaration cannot be pleaded to set aside an office-judgment. *Hartshorne v. Ingle*, 91.
53. Bail residing in Alexandria county cannot be received to an action in Washington county. *Coningham v. Lacey*, 101.
54. Where two become bail jointly and severally, and two writs of *scire facias* are issued, and one of the bail surrenders the principal, he must pay the costs upon both writs of *scire facias*. *Pennington v. Thornton*, 101.
55. If the cause has been standing five terms without issue, or rule to plead, the Court will continue it at the defendant's request. *Morgan v. Voss*, 109.
56. The Court will not commit a bankrupt for want of bail, who has surrendered to the commissioners and whose examination is not closed, although the forty-two days have expired. *Lingan v. Bayley*, 112.
57. A special session for the trial of criminal causes, may be ordered at an adjourned session of the Court and may be holden at the same time with the adjourned session. *Memorandum*, 114.
58. The Court will give the defendant leave to withdraw the plea of "covenants performed," and to file a special plea to the merits, not decidedly bad, leaving the plaintiff to his demurrer. *Gill v. Patten*, 114.
59. The Court in Alexandria, will not grant a commission to examine witnesses, in a suit at common law, without affidavit showing it to be necessary for the purposes of justice. *Sutton v. Mandeville*, 115.
60. After plea, replication, rejoinder and special demurrer, the defendant is not entitled to oyer of the plaintiff's letters of administration, nor to plead that the plaintiff is not administrator. *Grahame v. Cooke*, 116.
61. After a writ of error has been served and returned to the Supreme Court, the record is no longer before the court below, and cannot be there amended; although at an adjourned session of the same term it appear that the writ of error

PRACTICE, (*Continued.*)

- has been dismissed in the court above, at the request of the party praying amendment. *United States v. Hooe*, 116.
62. Misdemeanors, in Alexandria county, are not to be tried until the term next after that to which the *capias* shall have been returned executed. *General Rule*, 122.
 63. On a plea of tender the defendant holds the affirmative and has a right to open and close the cause. *Auld v. Hepburn et al.* 122.
 64. The Court will not continue a cause because the plaintiff cannot find out the place of residence of his witness. *Smith v. Potts*, 123.
 65. If a party has had no opportunity to cross-examine a witness whose deposition has been taken under the Act of Congress, the Court will continue the cause. *Dade v. Young*, 123.
 66. If a cause be not at issue the Court will send it back to the rules. *Mayor & Commonalty of Alexandria v. Bowne*, 124.
 67. After "not guilty and issue," to an action of debt, on a judgment in Virginia, suggesting *devastavit*, the Court will not suffer the defendant to plead *nul tiel record*, without showing sufficient cause for not having pleaded it before. *Basstable v. Wilson*, 124.
 68. The Court will permit a defendant to confess judgment for the whole amount of damages laid in the writ, although no declaration be filed. *McNeil v. Cannon*, 127.
 69. If the clerk neglect to strike out a judgment as ordered by the Court, it may be done by order of the Court at the next term on affidavit of the facts. *United States v. Smith*, 127.
 70. A new trial will not be granted on affidavit that the plaintiff has since discovered testimony to discredit a witness who was examined at the trial, if that witness was not the only witness to the point on which he testified. *Brooke v. Peyton*, 128.
 71. In a chancery attachment against a British bankrupt, the Court will permit the assignees to appear and defend the suit; and to release the attached effects; on their producing a notarial copy of the commissioners' proceedings. *Wilson v. Stewart*, 128.
 72. On a motion to set aside an office-judgment upon an injunction bond, the Court will not suffer the defendant to plead that the obligee was dead at the time of the execution of the bond. *Porter v. Marsteller*, 129.
 73. An attachment of contempt for not attending as a witness must not be served in the court-house. *United States v. Scholfield*, 130.
 74. If the witness arrives before service of the attachment, and makes a reasonable excuse, the Court will countermand the attachment on payment of the costs of issuing it. *Ibid.*
 75. The order of calling the trial docket. *General Rule*, 133.
 76. The Court will not suffer the general issue to be withdrawn to enable the defendant to plead in abatement. *Bank of Columbia v. Scott's Administrator*, 134.
 77. The Court will not continue the cause because a commission to examine a witness has not been returned, unless the materiality of the testimony of the witness be shown by affidavit. *Morgan v. Voss*, 134.
 78. Leading questions may be asked in cross-examination. *Dawes v. Corcoran*, 137.
 79. Security for costs cannot be given in the clerk's office. It must be done in open court. *Offutt v. Parrott*, 139.
 80. It is not necessary to lay a rule on a defendant in chancery to answer the bill. *Anonymous*, 139.
 81. A forthcoming-bond given, by mistake, for a sum less than the judgment, may be quashed, with the execution, on the motion of the plaintiff, on payment of the costs. *Stevens v. Lloyd*, 141.
 82. An adjourned session of a term is an extension of the preceding session, and has no jurisdiction over office-judgments rendered between the original and the adjourned session. *Memorandum*, 159.
 83. A defendant arrested to appear at next term cannot come in and confess judgment at this term, the writ being returnable to next term. *Askew v. Smith*, 159.
 84. The defendant cannot appear to a chancery attachment in Virginia, without giving special bail. *Mayor & Commonalty of Alexandria v. Cooke et al.* 160.
 85. In a chancery attachment in Virginia, the Court may order the attached debt to

PRACTICE, (*Continued.*)

- be paid over to the plaintiff, on his giving security to refund, &c., although the plaintiff's right may be doubtful. *Wilson v. Dandridge et al.* 160.
86. After the jury has returned into court to give their verdict, the Court will not permit a witness to be examined, who has come into court since the jury retired. *Riley v. Cooper*, 166.
87. After the term in which a rule was laid on the plaintiff to give security for fees, the clerk, upon a motion for judgment on the rule need not prove the plaintiff to be a non-resident. *Devigny v. Moore*, 174.
88. A prisoner charged with counterfeiting notes of the Bank of the United States, is not entitled to copy of the indictment and list of the witnesses, two days before pleading. *United States v. Williams & Ray*, 178.
89. After conviction of assault and battery, the Court will permit the defendant to give security to abide the judgment. *United States v. Greenwood*, 186.
90. The defendant has not a right to open the cause in all cases where he holds the affirmative of the issue. *Sutton v. Mandeville*, 187.
91. After judgment for the plaintiff, on the defendant's demurrer, and writ of inquiry awarded, the Court will not permit the defendant to plead *de novo* without withdrawing the demurrer. *Woodrow v. Coleman*, 192.
92. Actions of replevin may, in Alexandria, be tried at the first term. *Wilson v. Johnston*, 198.
93. An executor may be ruled to plead before the expiration of the year after letters granted. *Buckley v. Beatty*, 245; *Frazier v. Brackenridge*, 203.
94. The defendant may give special bail at any time during the return term, although the plaintiff may have taken an assignment of the bail bond. *Rhodes v. Brooke*, 206.
95. The Court will not, at a subsequent term, reinstate a cause which has been *non prossed* for want of security for costs. *Lindsay v. Twining*, 206.
96. A *venire* may be postponed. *United States v. Peacock*, 215.
97. After jury sworn the Court will not quash the indictment, before verdict, without the prisoner's consent. *Ibid.*
98. Sureties of an insolvent debtor in a duty bond are not entitled to judgment, at the first term against their principal. *Johns v. Brodhag*, 235.
99. The plaintiff, having proceeded both at law and in equity, must make his election. *Allison v. Alexander*, 237.
100. After office-judgment, the Court will not receive the plea of limitations. *Smith v. Stoops*, 238.
101. If an infant be brought into court, a guardian *ad litem* may be appointed without commission. *Reinhart v. Orme*, 244.
102. Administrators are bound to plead before expiration of the year from the date of the letters of administration. *Frazier v. Brackenridge*, 203; *Buckley v. Beatty's Administrator*, 245.
103. The Court will not permit an amendment making new parties. *Morris v. Barney*, 245.
104. After plea of "property in the defendant," the Court will permit the defendant to plead "property in a stranger," on payment of all antecedent costs, and a continuance if requested. *Semmes v. O'Neale*, 246.
105. If, by an amendment the nature of the action be changed, it is to be considered as a new cause, and may be continued although at the fifth term after its commencement. *Schnertzel v. Purcell*, 246.
106. A cause is not regularly for trial unless it has been put at issue at a preceding term. *Ibid.*
107. An administrator, in Alexandria county, has a right to give a preference to a creditor by confessing a judgment; and a court of equity will not interfere by injunction. *Wilson v. Wilson*, 255.
108. The Court will not permit a point of law to be argued to the jury, which the Court has decided. *Johnston v. Harris*, 257.
109. Witnesses are entitled to their fees, although the summons be served by a private person. *Power v. Semmes*, 247.
110. In an action upon a bond conditioned to pay money by instalments, if the verdict be rendered before all the instalments are due, the jury must find how much is due upon each instalment, and when payable; as well those to become payable, as those already payable. *Davidson v. Brown*, 250.

PRACTICE, (*Continued.*)

111. Causes *non prossed* at a previous session of the same term may be reinstated if the absence of the plaintiff's counsel was caused by severe sickness. *Memorandum*, 253.
112. The Court, at an adjourned session, will not hear a motion to dissolve an injunction upon notice given after the first session of the term. *Burford v. Ringgold*, 253.
113. After a general appearance the defendant may plead in abatement that the *capias* was not properly served. *Knox v. Summers*, 260.
114. *Quere*, whether a defendant, discharged under the insolvent law, after arrest upon a *capias ad respondendum*, and before the return, can be compelled to appear. *Stover v. Densley*, 267.
115. If there be no declaration the Court will not require special bail if the plaintiff does not appear at the return of the writ. *Thompson v. Carenough*, 267.
116. If there be only one issue to be tried, and the defendant holds the affirmative of that issue, he has a right to open and close the argument. *Davidson v. Henop*, 280.
117. When there is a rule to employ new counsel, the cause may be continued after the fifth term. *Fenwick v. Brent et al.* 280.
118. If the plaintiff has not a domicile in this district he may be ruled to give security for costs. *Duane v. Rind*, 281.
119. Leave to amend on payment of full costs. *Ferris et al. v. Williams*, 281.
120. In actions upon duty bonds the United States are entitled to judgment at the first term. *United States v. Johns*, 284.
121. Counter affidavits cannot be read on a motion for the continuance of a cause. *Manning v. Jamesson et al.* 285.
122. When the writ of inquiry is set aside by the defendant, the plaintiff may have the cause continued at defendant's costs. *McCulloch v. Debutts*, 285.
123. Judgment cannot be confessed before the return term of the writ. *Haden v. Perry*, 285.
124. It is not necessary that the notice of taking a deposition under the Act of Congress should state the reason of taking it. *Debutts v. McCulloch*, 286.
125. An attachment cannot be served in Court. *Davis v. Sherron*, 287.
126. The Court is not bound to give an opinion instantan, on the trial of a cause, but may direct the point to be saved by a special verdict. *Croudson v. Leonard*, 291.
127. Cause may be shown against a *decree nisi* at any time during the term and before any other order is made. *Allen v. Thomas*, 294.
128. A deposition taken more than six months after replication, in a chancery suit, cannot be read at the hearing unless taken by consent, or by order of the court, or out of the district. *Wiggins v. Wiggins*, 299.
129. Notice of motion to dissolve injunction given on the first day of the term is notice that the motion is to be made at the next succeeding term. *Ramsay v. Wilson*, 304.
130. Affidavits of jurors will not be received to show miscalculation, mistake, or misconduct of jurors in giving their verdict. *Ladd v. Wilson*, 305.
131. In case of the death of a plaintiff, the filing of letters of administration, is such a proceeding in the case before the tenth day of the second court as will justify the Court in retaining cognizance of the cause under the Act of Maryland, 1785, c. 80, § 1. *Wilson v. Harbaugh*, 315.
132. Upon an attachment under the Act of 1795, c. 56, the plaintiff must prove his debt before he can obtain judgment of condemnation. *Stephenson v. Gjberson*, 319.
133. To obtain an attachment under the Act of Maryland, 1795, c. 56, it is not necessary that all the plaintiffs should make affidavit; nor that it should appear that they were all citizens of the United States. *Birch et al. v. Butler*, 319.
134. A writ of attachment and *capias* may be amended by inserting the christian names of the plaintiffs, with the leave of the Court, before condemnation. *Ibid.*
135. It is not necessary that a forthcoming bond should recite the return of the execution, nor the certificate of the service, nor the name of the person by whom it was served; but it must state that the execution was served. *Ambler v. McMechem*, 320.

PRACTICE, (*Continued.*)

136. It is no ground of general demurrer to an indictment for a misdemeanor under the laws of Virginia, of 1792 and 1795, that the name of a prosecutor is not written at the foot of the indictment. *United States v. Sanford*, 323.
137. Supplemental affidavits will not be received upon a motion for the continuance of a cause. *Norwood v. Sutton*, 327.
138. Upon executing a writ of inquiry upon a judgment by default, the jury must find at least one mill in damages. *Frazier v. Lomax*, 328.
139. A petitioner for freedom, in custody, will not be discharged upon the request of the master, unless upon security given by him to have the petitioner forthcoming, &c. to prosecute his petition for freedom. *Ex parte Negro Letty*, 328.
140. If bail has not been required upon the *capias ad respondendum*, it will not, upon setting aside the office judgment, be required without affidavit. *Gordon v. Riddle*, 329.
141. To set aside an office judgment, the Court will not permit the defendant to plead specially, matter which may be given in evidence upon the general issue. *Vowell v. Lyles*, 329.
142. In all cases of felony, by the laws of Virginia, the prisoner is entitled to a peremptory challenge of twenty jurors. *United States v. Browning*, 330.
143. In a civil cause, this Court may send an attachment into Virginia for a witness who resides within one hundred miles of the place of trial; and such attachment is to be directed to and served by the marshal of the district of Virginia. *Voss v. Luke*, 331.
144. The defendant is not, of course entitled to a continuance, upon the death of the plaintiff. *Alexander v. Patten*, 338.
145. The Court will not compel the opposite party to produce depositions taken on his part by consent; nor enforce the private agreements of counsel; but will see that parties are not entrapped by such agreements. *Moore v. Dulany*, 341.
146. The defendant may, at the trial court, give notice to a non-resident plaintiff that security for costs will be required, and the cause will be continued if the plaintiff is not ready to give the security. *Thomas v. Woodhouse*, 341.
147. When depositions have been taken by one party without notice to the other, the cause may be continued. *Straas v. Marine Ins. Co. of Alexandria*, 343.
148. The Court will not continue a cause for the absence of a witness who has been summoned, and who lives within one hundred miles of this place, if no attachment has been moved for, although he resides out of this district. *Woods et al. v. Young*, 346.
149. If the only resident member of a copartnership, who are plaintiffs, dies pending the suit, the defendant may demand security for costs against the surviving plaintiffs, and the Court will continue the cause to give the defendant an opportunity to lay the rule and give sixty days' notice. *Lambert v. Smith*, 347.
150. If the blanks in the declaration have been filled up at the trial term, and the defendant pleads with the knowledge that they have been so filled up, it is not a ground for the continuance of the cause. *Ibid.*
151. If the writ of inquiry be set aside at the trial term, the plaintiff is entitled to a continuance at the defendant's costs. *Beck v. Jones*, 347.
152. A resident of Alexandria, suing in Washington, must give security for costs. *Lovering v. Heard*, 349.
153. Upon a petition for freedom the Court will not require the defendant to give security for the wages of the petitioner during the litigation. *Negro Ben v. Scott*, 350.
154. The costs of a continuance await the event of the cause, unless there is a special order to the contrary. An attachment will not lie for the non-payment of the costs of a continuance until after a rule to show cause; nor unless there has been a personal service of the order of the Court to pay the costs, nor unless the bill of costs state the particular items. *Dyson v. White*, 359.
155. The Court will not sign a bill of exceptions which states that it contains all the evidence in the cause, unless, &c. *Lyles v. Mayor & Commonalty of Alexandria*, 361.
156. The Court will not grant an attachment against a party for not paying his witness, unless payment was demanded by a person having authority to receive payment. And that authority must appear. *Nally v. Lambell*, 365.

PRACTICE, (*Continued.*)

157. An affidavit is not necessary to continue a petition for freedom at the first term. *Negro Ben v. Scott*, 365.
158. The six months' stay upon a supersedeas is reckoned from the day of the confession of the new judgment. The sum confessed need not be repeated in the blank at the end of the supersedeas. *Hodgson et al. v. Mountz*, 366.
159. This Court will issue a bench warrant against a person charged with treason, upon *ex parte* affidavits before any presentment or indictment made or found by a grand jury; and when arrested will commit him without stating when or where he is to answer for the offence. *United States v. Bollman et al.* 373.
160. An attachment for not returning a writ of *habeas corpus*, will not be issued until three days shall have expired after service of the writ. *Ibid.*
161. Upon a motion to commit for trial the party accused may be heard by counsel. *Ibid.*
162. In a chancery attachment, if the subpoena be served on the principal the bill cannot be taken for confessed for non-appearance, as in ordinary cases in equity; but there must be an affidavit and publication, &c., according to the law of Virginia. *Dean v. Legg et al.* 392.
163. A material amendment of a bill, after answer, must be on payment of all costs, including the solicitor's fee. *Wallace v. Taylor et al.* 393.
164. The Court will not order a defendant's appearance to be stricken out so as to charge the marshal. *Wood v. Dixon*, 401.
165. Costs on appeal, from a justice of the peace, are within the discretion of the Court, if the judgment be affirmed in part. *Mead v. Scott*, 401.
166. The plaintiff will not be permitted to file his replication after the rule-day, and in term-time, but upon condition of a continuance of the cause. *Veatch v. Harbaugh*, 402.
167. The party, upon whom the burden of proof is thrown by the issue, is to open and close the argument. *Dunlop v. Peter*, 403.
168. When leave is given to amend on payment of costs, the payment is not a condition precedent, unless so specially expressed in the order. *Wigfield v. Dyer*, 403.
169. Upon the plea of performance the plaintiff is not bound to produce the original covenant. *Beall v. Newton*, 404.
170. The party who holds the affirmative of the issues has the right to open and close the argument to the jury. *Ibid.*
171. The Court will not continue the cause for the defendant on the ground that his receipts are mislaid, unless the affidavit states the amount and date of the receipts so that the plaintiff may admit or deny them; nor unless it states circumstances by which the Court can judge whether reasonable diligence has been used in searching for them. *Hyde v. Liverse*, 408.
172. The Court will permit the prisoner to retract his plea of guilty, in a capital case, and to plead not guilty. *United States v. Dixon*, 414.
173. Upon the trial of the issue upon the plea of payment, the plaintiff is not bound to produce the bond. *Darlington v. Groverman*, 416.
174. After acquittal the Court will not require the prisoner to give security for his good behavior. *United States v. Venable*, 417.
175. If the principal comes and gives special bail, and sets aside the plea pleaded by the appearance-bail, the plaintiff is entitled to a continuance of the cause. *Wise v. Groverman*, 418.
176. A clerical mistake in entering a judgment may be corrected at a subsequent term; and an execution issued thereon may be quashed. *Pierce v. Turner*, 433.
177. The Court will permit the defendant to withdraw the general issue and file a general demurrer. *Deakins v. Lee*, 442.
178. The Court will not continue a suit at law, on the motion of the defendant, on the ground that the plaintiff had not answered a bill of discovery, if the bill seek relief also. *Bennett v. Wilson*, 446.
179. The Court will grant a rule on a witness residing in Baltimore, to show cause why he should not be attached for not attending according to summons. *Hodgson v. Butts*, 447.
180. The Court will not permit the plaintiff to read to the jury his own statement of his account; nor will the Court permit the jury to take minutes of the items to which no evidence was offered. *Crease v. Parker*, 448.

PRACTICE, (*Continued.*)

181. The Court will not, on motion of the defendant, continue a cause because the costs of a *non pros.* have not been paid. *Wheaton v. Love*, 451.
182. After judgment for the plaintiff on demurrer to the replication to the plea of limitations, the Court will not permit the defendant to withdraw the demurrer and rejoin specially, unless he can show by affidavits that it is necessary to the justice of the case. *Wilson v. Mandeville et al.* 452.
183. It is not necessary, upon a rule on a constable to show cause why he should not be removed "for extortion under color of his office," that there should be any specification of the particular facts relied upon. *Jones v. Woodrow & Neale*, 455.
184. The Court will not order actions to be consolidated. *Bank of Alexandria v. Young*, 458.
185. A prison-bounds bond may be assigned by a deputy marshal, in Alexandria county. *Scott v. Wise*, 473.
186. If, after eight jurors have been sworn, the defendant challenge one for favor, the challenge shall be tried by the jurors already sworn. *Negro Reuben v. Bridges*, 477.
187. A juror shall not be examined on oath as to his religious opinions on the subject of slavery; nor will the Court, on a challenge for favor, suffer evidence to be given to the triers as to the prevailing opinion of individuals of the religious sect to which the juror belongs. *Ibid.*
188. Notice to dissolve an injunction must be given ten days before the term. If given in term, a term's notice is required. *Stoddert v. Waters*, 483.
189. A legal plaintiff has a right to dismiss a suit brought in his name by order of a person who claims to be his assignee; and the Court will not interfere to protect the assignee, unless the evidence of the assignment is clear. *Welch v. Mandeville*, 489.
190. In actions against executors the statute of limitations may be pleaded after office-judgment. *Wilson v. Turberville's Executors*, 492.
191. The Court will not give an instruction upon a point not material to the issue. *Harper v. Smith*, 495.
192. In Alexandria county, a *certiorari* in "forcible entry and detainer," may be issued by one judge in vacation. *United States v. Browning*, 500.
193. A set-off, or account in bar, must be filed one term before trial, in Alexandria. *Janney v. Baggott*, 503.
194. Upon the presentment by the grand jury, the Court will order an indictment to be sent up without the name of a prosecutor, upon the suggestion of the Attorney of the United States. *United States v. Dulany*, 510.
195. A copy will not be received as oyer, when a *profert* has been made of the original; and if a copy is offered the defendant may demur. *Wellford v. Miller*, 514.
196. Records, under the seals of the respective State courts, are admitted, under the agreement of the bar, without other authentication. *Smallwood v. Violet*, 516.
197. The two jurors first sworn in a cause are the proper triers of a challenge for favor. *Negro Clem Joice v. Alexander*, 528.
198. The Court will not permit counsel to argue to the triers upon a challenge for favor. *Ibid.*
199. The challenged juror cannot be examined as a witness to the triers. *Ibid.*
200. Witnesses may be separated and examined each out of the hearing of the others. *Ibid.*
201. The Court will not lend an easy ear to the affidavits of jurors as to their proceedings after they have retired to consider of their verdict. *Cherry v. Sweeny*, 530.
202. After an appearance entered at a preceding term it is too late to call for the authority to appear. *Rogers et al. v. Crommelin*, 536.
203. If books and papers are in court they may be called for after the jury is sworn. *Banks v. Miller*, 543.
204. If the Court is divided upon an objection to evidence, the objection does not prevail. *Henry v. Ricketts et al.* 545.
205. The Court will not permit the statute of limitations to be pleaded to an action of trespass for mesne profits, after the rule-day, but upon payment of all antecedent costs and a continuance of the cause. *Marsteller v. McClean*, 550.
206. The fees of a magistrate in another State for taking a deposition under the Act of Congress, may be taxed in the bill of costs in Virginia. *Fry v. Yeaton*, 550.

PRACTICE, (*Continued.*)

207. After the rule to plead has expired, the Court will not compel the plaintiff to produce his cause of action. *Bailey v. Sutton et al.* 551.
208. A subscribing witness to a deed may be compelled to attend court to prove its execution so that it may be recorded. *Irwin v. Dunlop*, 552.
209. If a juror, in a civil cause, be taken suddenly ill, the jury may be discharged, and the trial postponed to the next term. *Young v. Marine Ins. Co. of Alexandria*, 566.
210. Two hours' notice of taking a deposition in Alexandria, where all the parties resided, was too short. *Jamieson v. Willis*, 566.
211. The Court will not permit a defendant to tender an issue to which he had demurred when tendered by the plaintiff. *Hodgson v. The Marine Ins. Co. of Alexandria*, 569.
212. At the hearing of a cause in chancery the Court will not receive *viva voce* testimony unless to prove exhibits. *Debotts v. Bacon*, 569.
213. When costs are given on leave to amend, the payment of the costs is not a condition precedent. *Butts v. Chapman*, 570.

PRISON-BOUNDS.

1. A prison-bounds bond may be assigned by a deputy marshal, in Alexandria. *Scott v. Wise*, 473.
2. Every prisoner, not committed for treason or felony is entitled to the benefit of the prison bounds, upon giving security. *United States v. Wise*, 546.
3. When a debtor is in the prison bounds the Court will not award a *habeas corpus* to discharge him on the ground that his creditor has refused to pay his daily allowance. *Wilson v. Marshal of D. C.* 608.

PRIVILEGE.

A clerk of this Court is not entitled to sue by attachment of privilege. *Forrest v. Hanson*, 12.

PROCESS.

1. A *capias* may be issued as the first process against a person for unlawful gaming. *United States v. Cotton*, 55.
2. A *capias* is proper process upon an indictment for misdemeanor, in Alexandria county. *United States v. Jamesson*, 62.
3. A *capias* is the proper process upon an indictment, for misdemeanor, found after service of a summons to show cause why an indictment or information should not be filed. *United States v. Veitch*, 81.
4. After a general appearance the defendant may plead in abatement that the *capias* was not properly served. *Knor v. Summers*, 260.

PROMISSORY NOTES.

See Bills and Notes.

PROSECUTOR.

1. A prosecutor has no right to withdraw the prosecution without the consent of the Attorney of the United States. *Commonwealth v. Dulany*, 82.
2. The name of a prosecutor must be written at the foot of an indictment for keeping a bawdy house. *United States v. Mary Rawlinson*, 83.
3. The want of the name of a prosecutor upon an indictment is no cause for arresting the judgment. *United States v. Singleton*, 237.
4. It is no ground for general demurrer to an indictment for a misdemeanor under the laws of Virginia of 1792 and 1795, that the name of a prosecutor is not written at the foot of the indictment. *United States v. Sanford*, 323.
5. Upon a presentment by the grand jury the Court will order an indictment to be sent up, without the name of a prosecutor, upon the suggestion of the attorney of the United States. *United States v. Dulany*, 510.

PUNISHMENT.

When a statute merely alters the punishment of a common-law offence, the statutory punishment may be inflicted, although the indictment does not conclude *contra formam statuti*. *United States v. Norris*, 411.

RECOGNIZANCE.

1. If a witness appears according to his recognizance, and does not depart without

RECOGNIZANCE, (*Continued.*)

- the leave of the Court, he is not bound by that recognizance to appear at the next term, unless the recognizance is respited, although the cause should be continued. *United States v. Butler*, 422.
2. Upon a recognizance in a case of misdemeanor the party is bound to appear on the first day of the term. *United States v. Hodgkin*, 510.

RECORD.

1. The record of a court in Virginia must be certified by the presiding magistrate. *Gardner v. Lindo*, 78.
2. A clerical error may be corrected at the next term. *Ex parte Smith*, 127.
3. The Act of Congress respecting the authentication of the records of state courts does not apply to the records of the courts of the United States. *Mason v. Lawrason*, 190.
4. A plea of the pendency of a prior suit in another court must offer to produce the record of such suit. *Riddle v. Potter*, 288.
5. A record of a cause is the history of the proceedings in an action, made out at full length and in technical language; and when once made out and written in the record book, the power of the clerk over it has ceased; it has become a public document, and cannot be altered unless by order of the Court under certain circumstances. *Barnes v. Lee*, 430, 471.
6. The plea of "*nul tiel record*," refers to the time of the plea pleaded, and is not affected by a subsequent amendment. A material variance, between the record and the recital of it in the *scire facias*, is fatal. *Ibid*.
7. A clerical error in entering a judgment may be corrected at a subsequent term; and an execution issued thereon may be quashed. *Pierce v. Turner*, 433.
8. Records, under the seals of the respective state courts, are admitted, under the agreement of the bar, without other authentication. *Smallwood v. Violet*, 516.

RE-ENTRY.

In ejectment upon reentry for non-payment of rent, the plaintiff need not show a title in fee if he has been in possession forty-four years, nor that there were not sufficient goods on the premises within the first thirty days; nor that he demanded the rent on the day it became due; nor on what part of a vacant town lot the rent was demanded. *Cooke's Lessee v. Voss*, 25.

RENT.

1. See reentry. *Cooke's Lessee v. Voss*, 25.
2. Goods, in the hands of an officer under a distress for rent, may be attached, by the same landlord, for rent not yet due; and may be condemned although replevied by the tenant after the attachment levied. *Herbert v. Ward*, 30.
3. An acceptance by the tenant, of a bill drawn on him by the landlord for the rent, is not a bar to the distress if the bill be not paid. *Alexander v. Turner*, 86.
4. Upon the plea of "no rent arrear," the tenant may give evidence of work done, and goods sold and delivered to the landlord, without notice of set-off. *Fendall v. Billy*, 87.
5. Under the statute of Virginia, goods not upon the premises may be attached to secure rent not due. *Brockett v. Johns*, 100.
6. Upon a deed made in 1779 reserving an annual rent of £26 current money of Virginia forever, the rent accruing during the existence of paper money are to be reduced according to the scale of depreciation. *Marsteller v. Faw*, 117.
7. If the landlord take the single bill of a third person for the amount of rent due from his tenant, and give time of payment to the third person until he fails, this is good evidence to support the plea of "no rent arrear." *Josse v. Shultz*, 135.
8. Assumpsit will not lie, at common law, on a parol demise.. The stat. of 11 Geo. 2, c. 19, is not in force in Virginia. *Wise v. Decker*, 171.
9. In an action of covenant for rent the landlord cannot recover interest. *Gill v. Patton*, 188.
10. In Virginia, an action for use and occupation will lie although there be a parol demise for a time and rent certain, if it be waived and a promise to pay for the time occupied. *Wise v. Decker*, 190.
11. In an action for use and occupation the plaintiff can only recover for the time of actual occupation. *Carroll v. Finnagan*, 234.

RENT, (Continued.)

12. Judgment in replevin, for double rent. *Alexander v. Harris*, 243.
13. A lease for ninety-nine years, not acknowledged and recorded, is not good for seven years; but is evidence of the rate of rent in an action for use and occupation. *Brohawn v. Van Ness*, 366.
14. The landlord may distrain after the death of the tenant. *McLaughlin v. Riggs*, 410.
15. Upon the issue of "no rent arrear," the landlord is not bound to prove that the distress was laid by his order. *Ibid.*
16. Property distrained for rent, may be transferred by the tenant to his creditors, subject to the lien for rent. *Cooke v. Neale*, 493.

REPLEVIN.

1. See Rent. *Herbert v. Ward*, 30.
2. See Rent. *Jones v. Shultz*, 135.
3. Actions of replevin, in Alexandria, may be tried at the first term. *Wilson v. Johnston*, 198.
4. After plea of "property in the defendant" the Court will permit the defendant to plead "property in a stranger," on payment of all antecedent costs, and a continuance if requested. *Semmes v. O'Neale*, 246.
5. See Rent, 14, 15. *McLaughlin v. Riggs*, 410.
6. The Act of Maryland, 1785, c. 34, which forbids the replevin of goods distrained for public dues, is not applicable to the corporation taxes of the city of Washington. *Carroll v. Whitcroft*, 609.
7. The marshal's commission of five per cent. may be included in the replevin bond for rent, in Alexandria county. *Alexander v. Thomas*, 92.

RIOT.

1. To constitute a riot it is not necessary that the unlawful intention should have existed at the time of meeting; but if, having met for a lawful purpose, the unlawful intent be afterwards formed and executed, it is sufficient; and the unlawful act is evidence of the unlawful intent. *United States v. McFarlane et al.* 140.
2. Riots are punishable at common law, notwithstanding the statute. *Id.* 163.
3. Riot, and assault and battery may be joined in the same indictment. *Ibid.*
4. Imprisonment is not a necessary part of the punishment of riot at common law. *Ibid.*
5. The defendant's witnesses, who were engaged in the riot, will not be permitted to give evidence of their intention in meeting. *United States v. Dunn et al.* 165.

ROAD.

No road in Virginia is a highway within the statute which takes away the benefit of clergy in certain cases, unless it be a public road laid out according to law; no evidence of which can be received but the record. *United States v. King*, 444.

ROBBERY.

See Road. *United States v. King*, 444.

RUNAWAYS.

A justice of the peace, in Alexandria, cannot commit a person as a runaway unless according to the form of the Act of Virginia of 26th December, 1792, p. 246. *Ex parte Negro Anthony*, 295.

SALE.

1. The vendee of a slave cannot, in an action for money had and received, recover the purchase-money upon a defect of title, without offering to return the slave; nor if there was an express warranty of title under seal. *Gunnel v. Dade*, 427.
2. An agreement to sell and transfer goods, seized and held as a distress for rent due from the vendor, will transfer the general property so as to enable the vendee to maintain trover, after the goods have been replevied. *Cooke v. Woodrow*, 437.
3. When bills are drawn upon a consignee on a shipment of tobacco, he has no right to hold up the tobacco, after the time of payment of the bills, without orders, but should sell to meet the payment of the bills. *Potts v. Finlay et al.* 514.

SCIRE FACIAS.

1. If the defendant appear to a *scire facias*, it is immaterial by whom the writ was served. *Gadsby v. Miller*, 39.
2. Where two become bail jointly and severally, and two writs of *scire facias* are issued, and one of the bail surrenders the principal, he must pay the costs upon both writs of *scire facias*. *Pennington v. Thornton*, 101.
3. After a year has elapsed, execution cannot issue here upon a judgment rendered in Maryland, without a *scire facias*, notwithstanding the thirteenth section of the Act of Congress of the 27th February, 1801. *McDonald v. White*, 149.
4. Bail will not be discharged by a surrender of the principal, or the production of his discharge as an insolvent, at the third term after the return of the *scire facias*. *Boyer v. Herty*, 251.
5. When an execution is countermanded at the request of the defendant and for his accommodation, the plaintiff may have a new execution, after the year and day without *scire facias*. *Phillips v. Lowndes*, 283.

SEAMEN.

1. An assault and battery by a seaman upon the master of the vessel does not amount to a confinement of the master, nor to an attempt to excite a revolt, within the Act of Congress. *United States v. Lawrence*, 94.
2. A ship lying in Baltimore is liable for the wages of a seaman hired for a voyage not prosecuted. *Lovering v. Bank of Columbia*, 152.
3. *Quære*, whether the authority to commit a seaman for deserting his ship is not limited to a justice of the peace? *Ex parte Sprout et al.* 424.
4. A voyage is not ended until the cargo and ballast are discharged. *Ibid.*

SELLING LIQUORS.

1. The day in an indictment for selling whiskey is not material. *United States v. Burch*, 36.
2. A servant selling liquors for his master without license, is not liable to the penalty. *United States v. Paxton*, 44; *United States v. Shuck*, 56.
3. All the acts of selling spirituous liquors, without license, before conviction, constitute but one offence; and the day laid in the information is not material, if it be within twelve months before filing the information. *Commonwealth v. Smith*, 46; *United States v. Gordon*, 58, 81.
4. In an information for selling spirituous liquors without license, it is not necessary to specify the kind of liquor, nor the person to whom sold. *Id.* 58.
5. Upon an indictment for retailing spirituous liquors the informer is not entitled to half of the penalty, and is a competent witness. *United States v. Voss*, 101.
6. Selling less than a pint under a license to sell not less than a pint, is selling without license. *United States v. Squaugh*, 174.
7. The practice of selling liquors, in a public manner, to negroes assembled in considerable numbers, and suffering them to drink the same in or about the house, on a Sabbath day, constitute the offence of keeping a disorderly house. *United States v. Lindsay*, 245; *United States v. Prout*, 203; *United States v. Coulter*, 203.
8. A tavern-keeper in Virginia could not, under the Act of December, 26, 1792, § 13, recover more than five dollars for liquors sold, in one year, to a boarder, to be drank in or about the house. *Koonen v. Thomee*, 290.
9. A selling by the wife with the assent of the husband, is a selling by the husband. The day is not material. *United States v. Birch*, 571.

SERVANT.

1. A servant selling spirituous liquors for his master is not personally liable to the penalty. *United States v. Shuck*, 56; *United States v. Paxton*, 44.
2. A contract, made in this country, does not create such a relation of master and servant as will authorize a justice of the peace to compel specific service, and to inflict stripes for disobedience under the Virginia law of 26th December, 1792, c. 132, but may give the master such a right to the service as will enable him to recover damages for enticing away the servant. *Milburne v. Byrne*, 239.
3. In assault and battery for beating the plaintiff's servant, *per quod*, &c., the plaintiff cannot recover without evidence of loss of service. *Voss v. Howard*, 251.

SET-OFF.

1. The defendant cannot set off a joint judgment, recovered by himself and wife, (for slander of the wife,) against the plaintiff. *Sutton v. Mandeville*, 2.
2. Upon the plea of "no rent arrear" the tenant may give evidence of work done, and goods sold and delivered to the landlord, without notice of set off. *Fendall v. Billy*, 87.
3. Damages, for use and occupation may be set off. *Brohawn v. Van Ness*, 366.
4. A defendant, under the bankrupt law cannot set off a debt due to him by a partnership against a claim by the assignee of one of the firm who became bankrupt. *Oxley v. Tucker*, 419.
5. A bond due by the bankrupt to the defendant cannot be set off against the defendant's note to a third person assigned to the assignee of the bankrupt's effects after commission issued. *McIver v. Wilson*, 423.
6. A set-off, or account in bar, must be filed one term before trial, in Alexandria. *Janney v. Baggott*, 503.
7. In an action by an insolvent debtor for the use of his trustee, the defendant may set off the plaintiff's note to a third person, with a blank indorsement, which came to the defendant's hands before the plaintiff's insolvency; but he cannot set off a joint note of the plaintiff and another. *Banks v. King*, 543.
8. Unliquidated damages for breach of warranty of the soundness of a horse cannot be set off against a note given for the purchase of the horse. *Morrison v. Clifford*, 585.
9. In an action by the indorsee against the maker of a promissory note, in Alexandria county, the defendant may set off the payee's note to him which he held before and at the time he had notice of the assignment of his own note to the plaintiff, although not then payable, but becoming payable before his own note. *Stewart v. Anderson*, 586.
10. Unliquidated damages arising from the non-performance of a verbal promise, to convey real estate, made without consideration and under a mistake of fact, cannot in equity be set off against a judgment at law. *Lee v. Thornton et al.* 589.

SHERIFF.

1. A sheriff cannot levy a *fi. fa.* on money in his hands made upon another *fi. fa.*, but must bring the money into court. *Fendall v. Turner*, 35.
2. In debt against the sureties in a sheriff's bond, his return that he had satisfied the plaintiff, is not evidence for the defendants. *Governor of Virginia v. Wise et al.* 142.
3. Upon a breach assigned in not paying money received upon a *fi. fa.*, the plaintiff must prove that the sheriff received the money before the return day of the execution. *Ibid.*
4. The sureties of a sheriff, in Virginia, are not liable for officer's fees, unless the account of the same shall have been delivered to the sheriff for collection before the first of March. *Governor of Virginia v. Turner's Sureties*, 286.

SHIP.

1. A ship, lying in Baltimore, whose owners reside in Alexandria, (D. C.) is not liable for provisions and repairs; Baltimore and Alexandria not being foreign to each other; but is liable for wages of a seaman, shipped for a voyage not prosecuted. *Lovering v. Bank of Columbia*, 152.
2. The wages of a ship-keeper, in port, are not a lien upon the ship, nor are repairs and provisions furnished to a ship, in Baltimore, whose owners live in Alexandria, D. C. *Id.* 207.

SLANDER.

1. It is no justification, in slander, that the defendant received his information from a slave. *Atkinson v. Patton*, 46.
2. In slander, bail is not required if the affidavit does not state the words spoken, and that the defendant is about to leave the district. *Lanstraz v. Powers*, 42.
3. A plea of justification, in slander, must be substantially proved. *Forrest v. Hanson*, 63.
4. It is actionable to say, of a director of a bank, that he is a swindler. *Ibid.*
5. In slander, one cent damages carries full costs. *Ibid.*

SLANDER, (*Continued*.)

6. In an action of slander, if it appears, from the plaintiff's evidence, that, at the time of speaking the words, the defendant named his author, who was a responsible man, the defendant may avail himself of that defence without pleading the matter as a special justification. *Hogan v. Brown*, 75.
7. A declaration, in slander, may be amended by making a new charge. *Dougherty and wife v. Bentley*, 219.
8. Words spoken of one of the plaintiffs cannot be given in evidence to support an averment of words spoken of both plaintiffs; nor can words spoken by each defendant separately, and out of the presence of each other, be given in evidence to support an averment of words spoken jointly by the defendants. *Davis and wife v. Sherron and wife*, 287.
9. Actionable words, spoken in the second person, will not support an averment of words spoken in the third person. *Birch v. Simms*, 550; *Rutherford v. Moore*, 388.
10. The words, "he gets his living by thieving," are actionable. *Ibid*.
11. It is a libel to print and publish these words, "he is a lying, slanderous rascal;" and it is no justification, that the plaintiff had stated what was not true unless he had stated it maliciously. *Snowdon v. Linde*, 569.

SLAVE.

1. This Court has not jurisdiction of larceny by a slave, in Washington county. *United States v. Negro Jack*, 44; *United States v. Louder*, 103.
2. A slave cannot be a witness if a free white man be a party. *Thomas v. Jamesson*, 91.
3. A slave may be a witness against a free mulatto, in Alexandria county. *United States v. Betty Ball*, 94.
4. This Court has no jurisdiction to try a slave for larceny in Washington county; but will quash the indictment, and send the slave to a justice of the peace to be tried. By consent of parties the court will try the issue whether slave or not. *United States v. Louder*, 103.
5. A slave may be tried for larceny, in this court sitting in Alexandria. *United States v. Betty Wright*, 123.
6. Manumitted slaves are competent witnesses for or against a free mulatto, in Washington county. *United States v. Barton*, 132.
7. A slave is not a competent witness for a free mulatto upon a public prosecution. *United States v. Nancy Swann*, 148.
8. A master of a vessel is not liable to the penalty of the Act of Virginia for carrying a slave out of the commonwealth, unless he did it knowingly. *McCall v. Eve*, 188; *Lee v. Lacey*, 263.
9. Upon a devise that a slave should be sold for eight years, after which he should be free, the term of eight years begins to run from the death of the testator or within a reasonable time thereafter. *Negro Bazil v. Kennedy*, 199.
10. A slave, brought into Alexandria in 1802 by a person removing from Maryland and omitting to take the oath within sixty days after his removal, is entitled to freedom under the Act of the 17th of December, 1792, although the person bringing the slave was not his owner. *Negro Loudon v. Scott*, 264.
11. A petitioner for freedom has not a right to go in search of witnesses. *Negro Moses v. Dunnoho*, 315.
12. Bringing a slave from Alexandria to Washington, is an importation contrary to the Act of Maryland, 1796, c. 67. *Negro William Foster v. Simmons*, 316.
13. Slaves are competent witnesses for free negroes indicted for assault and battery. *United States v. Negro Terry*, 318.
14. A free mulatto, born of a white woman, is a competent witness against a white man. *Minchin v. Docker*, 370.
15. Evidence that a black man has, for many years, publicly acted as a free man and been generally reputed to be free, rebuts the presumption of slavery arising from color, and is evidence that he was born of a white woman. *Ibid*.
16. A slave coming from Virginia into Maryland, more than a year after his master, and sold, is entitled to freedom under the Maryland Act, 1796, c. 67. *Negro Moses Burr v. Dunnahoo*, 370.
17. A slave is a competent witness for a free black man on a criminal prosecution. *United States v. Shorter*, 371.

SLAVE, (*Continued.*)

18. Assault and battery of a slave is an indictable offence. *United States v. Butler*, 373.
19. A sale of a slave, upon the express condition that he should be free at the end of six years, is not a manumission under the Maryland Act, 1796, c. 67. *Fidelio v. Dermott*, 405.
20. A manumission, by will, is not in prejudice of creditors, if the real and personal estate are sufficient, without the value of the manumitted slave, to pay all the debts of the testator. *Ibid.*
21. A manumission, by will, after a term of years, is not revoked by a codicil ordering the sale of all the testator's slaves, if at the time of making the codicil, their term of service had not expired. *Ibid.*
22. The general issue, on a petition for freedom, is that which puts in issue the simple question whether free or not. *Negro Ben v. Scott*, 407.
23. A slave imported does not gain his freedom by the omission of his master to prove to the satisfaction of the naval officer, or collector of taxes, the residence of the slave in the United States, according to the Maryland Act of April, 1783, c. 23. *Ibid.*
24. A deed transferring a slave in Maryland, not recorded, cannot be given in evidence without proof of its execution, although acknowledged before a justice of the peace in Maryland. *Lucy v. Slade*, 422.
25. The oath required by the Virginia Act of 17th December, 1792, § 4, is of no avail unless taken within sixty days after the removal of the party. *Ibid.*
26. A parol gift of a slave, in Virginia, in 1784, was void under the statute of 1758, although possession accompanied and followed the gift; and it was not made valid by the Act of 1787. *Lee v. Ramsay*, 435.
27. A legacy of a slave gives no title until assented to by the executor. *Ibid.*
28. A deed of gift of a slave, in 1790, was void unless possession accompanied and followed the deed. *Ibid.*
29. The owner of goods stolen by a slave is not a competent witness for the prosecution, because he is entitled to one half of the fine which the Court must impose under the Act of Congress. *United States v. Milly Rhodes*, 447.
30. The promise of a slave does not bind him when free, although it be to pay money borrowed to purchase his freedom. *Crease v. Parker*, 448.
31. Trespass *vi et armis* lies by the owner of a slave against a stranger who beats the slave, *per quod servitium amisit*. *Wilson v. Kedgely*, 477.
32. The list of slaves required by the Maryland Act, 1796, c. 67, must be delivered to the clerk of the county into which they are first brought, and within three months thereafter. *Negro Harry Davis v. Baltzer*, 482.
33. Money advanced to a slave to enable him to purchase his freedom, cannot be recovered of him after his emancipation, although he acknowledge the debt after suit brought. *Crease v. Parker*, 506.
34. A slave is not a competent witness against a free-born mulatto not subject to any term of servitude by law. *United States v. Peggy Hill*, 521.

STAMPS.

1. A receipt for goods to be paid for at a certain price, is a note for the security of money, within the stamp act of 1797. *Neale v. Hill*, 3; *Moore v. Gadsby*, 3.
2. A stamp is not necessary to an acknowledgment of having hired a house. *Brown v. Tonkin*, 85.

STERLING MONEY.

Judgment for sterling money. Irish sterling. *Bond v. Grace*, 96.

SUPERCARGO.

Delivery of the cargo to the owners, by the supercargo, is evidence of his receipt of his commissions, in an action against him by a third person who is entitled to a share in the commissions. *Manning v. Loudermilk*, 282.

SUPERSEDEAS.

1. It is no bar to an execution upon a *supersedeas*, in Washington county, that the plaintiff has recovered another judgment in Alexandria county upon the same cause of action if it be not satisfied. *Curry v. Lovett*, 80.
2. A writ of error is not a *supersedeas* unless served within ten days after the rendition of the judgment, although the parties should have agreed to stay execu-

SUPERSEDEAS, (*Continued.*)

- tion two months, and the writ of error should be served before the expiration of that time. *Thompson v. Voss*, 108.
3. A writ of error is not a *supersedeas* unless a copy of the writ be filed in the clerk's office for the adverse party according to the directions of the twenty-third section of the Judiciary Act of 1789. *Moore v. Dunlop*, 180; *Ex parte Negro Ben*, 532.
 4. One of two joint defendants may supersede the judgment as to himself, and the other need not be named in the *supersedeas*. *Hodgson v. Mountz et al.* 366.
 5. The six months stay upon a *supersedeas* is reckoned from the day of the confession of the new judgment. The sum confessed need not be repeated in the blank at the end of the *supersedeas*. Parol evidence may be received that the confession was made at a place within the jurisdiction of the magistrates. *Ibid.*
 6. If the writ of error be not a *supersedeas* to the original judgment, the Court below may proceed to judgment and execution upon the forthcoming bond. *Grundy v. Young*, 443.

SURETY.

1. Judgment will not be rendered on motion of one surety against another, unless the insolvency of the principal be fully proved. *White v. Perrin*, 50.
2. The summary remedy given, in Virginia, by motion against a co-surety, is confined to the court which rendered the original judgment. *Dade v. Mandeville*, 92.
3. In debt against the sureties upon a sheriff's bond, his return that he had satisfied the plaintiff, is not evidence for the defendants. *Governor of Virginia v. Wise et al.* 142.
4. In an action against the sureties in a sheriff's bond upon a breach assigned in not paying over money received upon *fi. fa.* the plaintiff must prove that the sheriff received the money before the return day of the execution. *Ibid.*
5. After conviction of assault and battery the Court will permit the defendant to give security to abide the judgment. *United States v. Greenwood*, 186.
6. Sureties of an insolvent debtor, in a duty bond, are not entitled to judgment, at the first term, against their principal. *Johns v. Brodhag*, 235.
7. The defendant may, at the trial court, give notice to a non-resident plaintiff, that security for costs will be required; and the cause will be continued if the plaintiff is not ready to give the security. *Thomas v. Woodhouse*, 341.
8. In an action against a surety in a bond to perform a decree, it is not necessary that notice of the decree should have been given to the principal. *White v. Swift*, 442.
9. If the maker of a note was solvent when it became payable, and the defendant, during such solvency, requested the plaintiff to sue the maker, and he did not, the defendant is discharged from liability, under the equity of the Virginia statute. *Patton v. Violet*, 463.
10. A surety who has paid money, for a bankrupt, in discharge of a duty-bond, has not the right of the United States to proceed against the person of the bankrupt, but only against his effects. *Kerr v. Hamilton*, 546.

TAVERN-KEEPER.

A tavern-keeper, in Virginia, could not, under the Act of December 26, 1792, § 13, recover more than five dollars for liquors sold in one year to a boarder, to be drank in or about the house. *Kooner v. Thomee*, 290.

TAXES.

The Act of Maryland, 1785, c. 34, which forbids the replevin of goods distrained for public dues, is not applicable to the corporation taxes of the city of Washington. *Carroll v. Whetcroft*, 609.

TENANT.

1. If a tenant, who has occupied and paid rent annually, holds over into a new year, it is evidence of a new demise for a year. *Hooff v. Ladd*, 167.
2. A tenant, who has erected a wood-shed upon posts inserted two feet into the earth, has a right to remove it during the term. *Krouse v. Ross*, 368.

TENDER.

1. On a plea of tender, the defendant holds the affirmative, and has a right to open and close the cause. *Auld v. Hepburn*, 122.

TENDER, (*Continued.*)

2. Upon a plea of tender, the defendant must prove that he produced and offered the money to the plaintiff. *Ladd v. Patten*, 263.
3. The plaintiff, upon a plea of tender, cannot take out the money, and proceed for more. *Mayor of Alexandria v. Patten*, 294.
4. If money, paid in advance, is to be forfeited, in case the residue be not paid by a certain day, the party, who is to pay, must tender, or use his best endeavor to tender, the balance on or before the day limited. *Bailey v. Duvall*, 283.

TOBACCO-NOTES.

Possession of tobacco-notes is evidence of possession of the tobacco which they represent. *Hance v. McCormick*, 522.

TREASON.

1. This Court will issue a bench warrant against a person charged with treason, upon *ex parte* affidavits, before any presentment or indictment made or found by a grand jury; and when arrested, will commit him to the prison of this court, without stating when or where he is to answer for the offence. *United States v. Bollman et al.* 373.
2. Upon an application for a bench warrant on a charge of treason, as well as upon a motion to commit for the same cause, messages, from the President of the United States to Congress, may be read. *Ibid.*
3. Upon a motion to commit a prisoner for treason, he may be heard by counsel. *Ibid.*

TRESPASS.

1. In trespass the defendant cannot justify, under the general issue. *Goddard v. Davis*, 33.
2. Bail may be required in trespass for cutting up a boat. *Voss v. Tuel*, 72.
3. In trespass, the plaintiff cannot recover damages for erecting a fence and obstructing his windows, unless he was in possession at the time of erecting the fence. *O'Neale v. Brown*, 79.
4. Possession alone will maintain trespass *quare clausum fregit*, against one who has no title. *Edmondson v. Lovell*, 103.
5. In trespass for breaking up the plaintiff's scow, if the defendant, knowing that a third person had committed the trespass, received from him the timbers and planks, knowing them to be the property of the plaintiff, he is guilty of the trespass. *Quere. Voss v. Baker*, 104.
6. In trespass the plats are evidence only, and do not constitute part of the pleadings as they do in ejectment. *Pancourt v. Barry*, 176.
7. It is not felony to steal rails inserted into posts fixed in the ground, if severed and taken away at one time. *United States v. Wagner*, 314.
8. Permanent and useful improvements, made upon land, may be given in evidence in mitigation of damages, in an action of trespass for mesne profits brought after recovery in ejectment. *Gill v. Patten*, 465.
9. Trespass *vi et armis* lies by the owner of a slave against a stranger who beats the slave *per quod servitium amisit*. *Wilson v. Kedgley*, 477.

TRIAL.

1. If a juror, in a civil cause, be taken suddenly ill, the jury may be discharged and the trial postponed to the next term. *Young v. Marine Ins. Co. of Alexandria*, 566.
2. The two jurors first sworn in a cause are the proper triers of a challenge for favor. *Negro Clem Joice v. Alexander*, 528.
3. The Court will not permit counsel to argue to the triers upon a challenge for favor. *Ibid.*

TROVER.

1. In trover a demand and refusal are not evidence of conversion if there be an oral agreement that the defendant should retain the possession of the goods as collateral security; although by a previous written agreement the defendant was bound to deliver them on demand. *McIntosh v. Summers*, 41.
2. General property in the goods, without actual possession, is sufficient to maintain trover. *Cooke v. Woodrow*, 437.
3. An agreement to sell and transfer goods seized and held as a distress for rent

TROVER, (*Continued.*)

- due from the vendor, will transfer the general property so as to enable the vendee to maintain trover after the goods have been replevied. *Ibid.*
4. Trover will not lie against the master of a vessel for the cargo unless the freight is paid or tendered, or the payment is waived; nor if the goods were lost so that they did not come to the use of the defendant. *Hodgson v. Woodhouse*, 549.
 5. In trover for "a chest containing sundry tools," and "a trunk containing sundry clothes;" the plaintiff cannot give evidence of the value of the tools and clothes, the defendant being charged only with conversion of the chest and trunk containing the tools and clothes, and not of the tools and clothes themselves. *Ball v. Patterson*, 604.
 6. A declaration in trover, for "a tool-chest containing divers tools and working utensils," and "a trunk containing clothes," is sufficiently certain. *Id.* 607.

TRUST.

1. The legal title of the trustees cannot be set up against the *cestui que trust*. *O'Neal's Lessee v. Brown*, 69.
2. By the Maryland Acts 1791, c. 45, § 2, and 1793, c. 58, the legal title vests in the *cestui que use*. *Ibid.*

USE AND OCCUPATION.

In Virginia an action for use and occupation will lie if there be a parol demise for a time and rent certain. *Wise v. Decker*, 190.

USURY.

1. If a negotiable sixty-day note for \$1,500 be put into the hands of a broker to raise money upon, and he buys, with it, flour which he sells for \$1,200; this is not usury. *Riddle v. Mandeville*, 95.
2. The Statute of Usury applies to corporations as well as to private persons. *Bank of Alexandria v. Mandeville*, 552.
3. The Bank of Alexandria, in discounting notes, may deduct the whole interest for the whole time they have to run. *Ibid.*

VARIANCE.

1. Variance between the *capias* and the declaration cannot be pleaded to set aside an office-judgment. *Hartshorne v. Ingle*, 91.
2. A verdict does not cure a variance between the covenant declared upon and the covenant produced on oyer. *Ingle v. Collard*, 152.
3. In setting forth the forged bill the omission of the words "account of," is fatal. *United States v. Peacock*, 215.
4. A material variance, between the record of the recognizance and the recital of it in the *scire facias*, is fatal. *Barnes v. Lee*, 430.

VERDICT.

1. It must appear, upon a special verdict, that the offence was committed before the filing of the information. *Commonwealth v. Leap*, 1.
2. After verdict, it is too late to object the want of a *profert*; or that the action by an administrator is in the *debet* and *detinet*. *Gardner v. Lindo*, 78.
3. A verdict does not cure a variance between the covenant declared upon and that produced on oyer. *Ingle v. Collard*, 152.
4. In an action upon a bond conditioned to pay money by instalments, if the verdict be rendered before all the instalments are payable, the jury must find how much is due upon each instalment and when payable; as well those to become payable as those already payable. *Davidson v. Brown*, 250.
5. The Court is not bound to give an opinion instantan, on the trial of a cause, but may direct the point to be saved by a special verdict. *Croudson v. Leonard*, 291.
6. Affidavits of jurymen will not be received to show miscalculation, mistake, or misconduct of the jurors in giving their verdict. *Ladd v. Wilson*, 305.
7. Upon an indictment for burglary, the jury may find the prisoner guilty of larceny only. *United States v. Dixon*, 414.

VIRGINIA.

1. Virginia had a right to legislate for that part of the District of Columbia which was ceded by Virginia, until the 27th of February, 1801. *Bank of Alexandria v. Young*, 458.
2. The laws of Virginia, in the county of Alexandria, are to be considered, with

VIRGINIA, (*Continued.*)

respect to the laws of the United States, as common law; that is, not repealed without negative words, or other and repugnant provisions upon the same subject. *Quere. Sutton v. Mandeville*, 115.

VOYAGE.

A voyage is not ended until the cargo and ballast are discharged. *Ex parte Sprout and Bailey*, 424.

WARRANT.

1. A warrant, to recover the penalty of a by-law, must name the plaintiffs by their corporate name, and must describe the offence with reasonable certainty. *Barnes v. Corporation of Washington*, 248.
2. A warrant of commitment should state probable cause supported by oath or affirmation. *Ex parte Burford*, 276.
3. A bench-warrant may be issued upon *ex parte* affidavits before any presentment or indictment by the grand jury, in cases of treason. *United States v. Bollman et al.* 373.
4. A warrant of commitment must state probable cause supported by oath or affirmation; must be under seal; and must limit the term of imprisonment. *Ex parte Sprout and Bailey*, 424.

WITNESS.

1. Diligent inquiry for a subscribing witness will not dispense with his testimony, if it appear that he is in the country. *Broadwell v. McClish*, 4.
2. Upon indictment for larceny under the Act of Congress, the owner of the stolen goods is a competent witness for the United States, after having released to them his half of the fine. *United States v. Clancey*, 13; *United States v. Hare*, 82; *United States v. McCann et al.* 207; *United States v. Brown*, 210.
3. A witness, who for want of surety to appear and testify, has been imprisoned, is entitled to the daily compensation for the time of imprisonment. *Eleanor Higginson's case*, 73.
4. A witness, who cannot testify in a cause without criminating himself, shall not be sworn. *Neale v. Coningham*, 76.
5. Upon a trial for larceny the owner of the stolen goods is a competent witness in chief, upon filing with the clerk of the court, for the use of the prisoner, a release of the witness's right to his half of the fine which the Court might impose. *United States v. Hare*, 82; *United States v. McCann et al.* 207; *United States v. Brown*, 210.
6. A *subpoena duces tecum* will not be ordered to the clerk of a court in Virginia to bring here original papers filed in his court. *Craig v. Richards*, 84.
7. An instrument can be proved only by the subscribing witness, unless, &c. *Rhodes v. Rigg*, 87.
8. A slave cannot be a witness if a white man be a party. *Thomas v. Jamesson*, 91.
9. A slave may be a witness against a free mulatto in Alexandria county. *United States v. Betty Bell*, 94.
10. Possession of the goods under one of the parties is not such an interest as will exclude him as a witness in favor of that party. *Hamilton v. Russell*, 97.
11. Evidence of the defendant's confession will not dispense with the testimony of the subscribing witness. *Smith v. Carolin*, 99.
12. The declarations of a witness, not under oath, may be given in evidence to discredit his testimony. *Harper v. Reily*, 100.
13. Upon an indictment for retailing spirituous liquors the informer is not entitled to half of the penalty, and is a competent witness. *United States v. Voss*, 101.
14. In *assumpsit* for goods sold and delivered, the defendant may prove a partnership between the plaintiff and the witness by the witness. *Lovejoy v. Wilson*, 102.
15. The informer is not entitled to half the penalty upon a minister for marrying a woman under sixteen years of age without the consent of her parents, &c., and is therefore a competent witness. *United States v. McCormick*, 106.
16. An attachment for not attending as a witness must not be served in court, and if the witness arrives before service of the attachment, and makes a reasonable excuse, the Court will countermand the attachment upon payment of the cost of issuing it. *United States v. Scholfield*, 130.
17. Manumitted slaves are competent witnesses for or against a free mulatto in Washington county. *United States v. Barton*, 132.

WITNESS, (*Continued.*)

18. Leading questions may be asked in cross-examination. *Dawes v. Corcoran*, 137.
19. A slave is not a competent witness in favor of a free mulatto upon a public prosecution. *United States v. Nancy Swann*, 148.
20. It is a contempt of court in a witness to refuse to answer proper questions before a grand jury, for which he may be fined and required to give security for his good behavior. *United States v. Caton*, 150.
21. The defendant's witnesses, who were engaged in the riot, will not be permitted to give evidence of their intention in meeting. *United States v. Dunn et al.* 165.
22. After the jury has returned into court to give their verdict, the Court will not permit a witness to be examined, who has come into court since the jury retired. *Riley v. Cooper*, 166.
23. A witness is not bound to answer a question, the answer to which may tend to criminate himself. *United States v. Moses*, 170.
24. A person interested in supporting a particular location is not a competent witness to prove it. *Pancoast v. Barry*, 176.
25. A witness may be allowed his fees although not regularly summoned. *United States v. Williams & Ray*, 178; *Power v. Semmes*, 247.
26. A creditor of an insolvent estate is a competent witness to support an action brought by the administrator against a third person. *Talbot v. Selby*, 181; *Robertson's Adm'r v. Selby*, 211.
27. The testimony of a subscribing witness may be dispensed with, if he is absent from the country. *Jones v. Lovell*, 183.
28. In larceny the owner of the stolen goods is a competent witness for the United States after releasing to them his interest in the fine. *United States v. McCann & Dulany*, 207; *United States v. Scipio Brown*, 210; *United States v. Clancey*, 13; *United States v. Hare*, 82; *United States v. Frank Tolson*, 269; *United States v. Morgan*, 278; *United States v. Shorter*, 315.
29. A witness cannot have an attachment for his fees until he has served an order of the Court upon the party to pay them. *Sadler v. More*, 212.
30. Counsel may testify as to facts not confidentially communicated to them by their clients; but not to facts confidentially communicated. *Murray v. Dowling*, 151; *Bank of Columbia v. French*, 221.
31. The maker of a note is a competent witness for the indorser. *Ibid.*
32. The grantor of a deed collaterally introduced is a competent witness to prove that the deed was fraudulently obtained. *Ibid.*
33. A free negro is a competent witness against a free white man. *Quære. United States v. Fisher*, 244.
34. If the subscribing witness to a note be not within reach of the process of the court, it is not necessary to produce him, or to prove his handwriting; but the defendant's handwriting may be proved. *Wellford v. Eakin*, 264.
35. Slaves are competent witnesses for free negroes indicted for assault and battery. *United States v. Negress Terry*, 318.
36. A mere honorary obligation to indemnify a prosecutor who is liable for costs, is not a sufficient interest to exclude the testimony of the witness. *United States v. Lyles*, 322.
37. This Court has power to send an attachment into Virginia for a witness in a civil cause who lives within one hundred miles of the place of trial; and such attachment is to be directed to and served by the marshal of the District of Virginia. *Voss v. Luke*, 331.
38. If there be judgment for one of several defendants upon a demurrer to his separate plea of bankruptcy, he may be examined as a witness for the other defendants, upon executing a release of his interest in his estate. *Hurlibi's Adm'r v. Bacon et al.* 340.
39. The Court will not continue a cause for the absence of a witness who has been summoned and who lives within one hundred miles of this place, if no attachment has been moved for, although he lives out of this district. *Woods et al. v. Young et al.* 346.
40. The Court will not compel a witness to testify against his interest, in a cause in which he is interested. *Carne & Slade v. McLane*, 351.
41. A deposition, *de bene esse*, cannot be read in evidence if the witness lives within one hundred miles of the place of trial, although he lives out of the district. *Park v. Willis*, 357.

WITNESS, (*Continued.*)

42. *Quere*, whether this Court can issue an attachment for a witness residing in Virginia, less than one hundred miles from this district. *Lewis v. Mandeville*, 360.
43. In an action against the owner of a stage-coach for carrying away a slave, the defendant's office-keeper is a competent witness for the defendant because he is equally liable to the action of either party. *Harrison v. Evans*, 364.
44. The Court will not grant an attachment against a party for not paying his witness, unless payment was demanded by a person having authority to receive payment; and that authority must appear. *Nally v. Lambell*, 365.
45. If, upon cross-examination, it appears that the witness is interested, the Court will instruct the jury that his testimony is not evidence. *Brohawn v. Van Ness*, 366.
46. A free colored man, born of a white woman, is a competent witness against a white man. *Minchin v. Docker*, 370.
47. Evidence, that a black man has, for many years, publicly acted as a freeman, and been generally reputed to be free, rebuts the presumption of slavery arising from color, and is evidence that he was born of a white woman. *Ibid.*
48. A slave is a competent witness for a free black man, on a criminal prosecution. *United States v. Shorter*, 371.
49. A witness is not competent to testify as to the similitude of handwriting, who has only seen for a few minutes, papers acknowledged by the defendant to be in his handwriting. *United States v. Johnson*, 371.
50. *Quere*, whether a person who has declared his disbelief of a future state is a competent witness; and whether such declarations can be given in evidence to prevent the witness from being sworn and examined. *Rutherford v. Moore*, 404.
51. A witness bound by recognizance to appear at a particular term is not bound by that recognizance to appear at the following term unless his recognizance is respited, although the cause should be continued. *United States v. Butler*, 422.
52. If a subscribing witness has not been inquired for at the place to which he was last traced, evidence of his handwriting cannot be admitted. *Cooke v. Woodrow*, 437.
53. A witness must answer whether he saw the defendant at a public gaming-table, inasmuch as the answer cannot criminate, nor tend to criminate the witness himself. *Ex parte Lindo*, 445.
54. If several persons jointly concerned in an assault and battery be separately indicted, each as for his own offence, and all tried at the same time by the same jury, one of the defendants may be examined as a witness for the others. *United States v. Hunter*, 446.
55. The owner of goods stolen by a slave, in Alexandria county, is not a competent witness for the prosecution, because he is entitled to one half of the fine which the Court must impose under the Act of Congress. *United States v. Milly Rhodes*, 447.
56. The Court will grant a rule on a witness residing in Baltimore, to show cause why he should not be attached for not attending according to summons. *Hodgson v. Butts*, 447.
57. The Court will send attachments, into Maryland, for witnesses who reside within one hundred miles of Washington, if they fail to attend according to summons. *Sommerville v. French*, 474.
58. The plaintiff's clerk, who puts a letter into the post-office, is a competent witness for the plaintiff, without a release, in an action against the postmaster for the loss of the letter. *Dunlop v. Munroe*, 536.
59. This Court will not grant a commission, in a civil action at common law, to take the deposition of a witness residing in Virginia within one hundred miles of the place of trial; because he may be summoned to attend personally. *Welford v. Miller*, 485.
60. The person, in whose favor a letter of guaranty has been given, may be examined as a witness for the plaintiff in an action upon the guaranty; his declarations therefore cannot be given in evidence. *Reid et al. v. Hodgson*, 491.
61. It is not necessary that the handwriting of a party should be proved by a person who has seen him write. *Ibid.*
62. If the testimony of a subscribing witness cannot be had, evidence may be given of his handwriting; and it is not necessary that the jury should be satisfied, by

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- the evidence, of the handwriting of the subscribing witness, if they are satisfied as to that of the maker. *Cooke v. Neale*, 493.
63. The principal obligor in the bond is a competent witness for the surety. *Harper v. Smith*, 495.
 64. Citizens of Alexandria are competent witnesses in an action of debt for the penalty of a by-law of the corporation. *Common Council of Alexandria v. Brockett*, 505.
 65. Free-born negroes, not subject to any term of servitude by law, are competent witnesses in all cases. Color alone is no objection to a witness. *United States v. Mullany*, 517.
 66. A slave is not a competent witness against a free-born mulatto, not subject to any term of servitude by law. *United States v. Peggy Hill*, 521.
 67. If a cause be postponed for two or three days, witnesses attending from Baltimore will be allowed payment for those days. *Hance v. McCormick*, 522.
 68. The two jurors first sworn in a cause are the proper triors of a challenge for favor. *Negro Clem Joice v. Alexander*, 528.
 69. The challenged juror cannot be examined as a witness to the triors. *Ibid.*
 70. Witnesses may be separated and examined each out of the hearing of the others. *Ibid.*
 71. The superintendent of the city of Washington is a competent witness for the plaintiffs in a suit brought in the names of the former commissioners to whose rights he has succeeded officially. *Thornton v. Stoddert*, 534.
 72. A subscribing witness to a deed, in Alexandria county, may be compelled to attend the court to prove its execution, so that it may be recorded. *Irwin v. Dunlap*, 552.
 73. The prosecutor, whose name is written at the foot of the indictment for a misdemeanor, in Alexandria county, is not a competent witness for the prosecution. *United States v. Birch*, 571.
 74. The wife of one of the defendants is not a competent witness for the plaintiff, although her husband has been discharged under the insolvent act. *Bank of Alexandria v. Mandeville*, 575.
 75. A creditor of a firm is a competent witness to prove its existence; so is a stockholder of a company who holds stock in the plaintiff's bank. *Ibid.*
 76. The Court will not in a civil suit, attach a witness who lives more than one hundred miles from the place of trial; nor issue a subpoena commanding him to go and testify before a magistrate. *Henry v. Ricketts et al.* 580.
 77. In an action for the use of a county, inhabitants of the county are competent witnesses for the plaintiff. *Governor of Virginia v. Evans et al.* 581.
 78. The principal obligor is a competent witness for the sureties upon a collateral issue. Where the defendants plead separately, in an action upon a bond with a collateral condition, the principal obligor is a competent witness for the sureties; and so one surety is a competent witness for another surety; but the sureties are not competent witnesses for the principal. *Ibid.*
 79. If a witness be surety for costs the Court will permit other security to be substituted, so as to remove the interest of the witness. *Ibid.*
 80. The mother of a bastard is a competent witness for the United States, on an indictment of the supposed father, under the Maryland Act of 1781, c. 13, and may be cross-examined as to her connection with other persons. *United States v. Collins*, 592.
 81. On an indictment for bigamy, a person, who has an action pending against the prisoner for goods furnished to the supposed first wife, is not a competent witness to prove the first marriage. *United States v. Maxwell*, 605.

